## (26,295)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1917.

## No. 828.

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DETROIT & MACKINAC RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

RICHARDSON LUMBER COMPANY.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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July 7—*Praecipe for entry of order with proof service.*
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1 STATE OF MICHIGAN,
*Supreme Court:*

*Declaration.*

(Filed April 3, 1915.)

STATE OF MICHIGAN,
*County of Bay, ss:*

In the Circuit Court for the County of Bay.

The Richardson Lumber Company, a corporation organized and existing under the laws of the State of Michigan, with its principal office at Alpena, Michigan, plaintiff here, by Gillett & Clark, its attorneys, complains of the Detroit & Mackinac Railway Company, an intra-state railroad corporation, organized and doing business within and under the laws of the State of Michigan, defendant here, in a plea of trespass upon the case upon promises, filing this declaration as commencement of suit.

2 For that Whereas, plaintiff at the time of the grievances hereinafter mentioned was engaged in the business of manufacturing lumber and other products of wood at Alpena, Michigan, where its mill was situated, and for that purpose was engaged in transporting logs and other forest products over the line of the defendant's railroad, subject to the regulations and tariffs imposed by defendant upon the traffic aforesaid.

And Whereas, the said defendant Railway company did on to-wit, January 20, 1909, issue and publish its tariff on saw-logs in carload lots consigned to the city of Alpena, made effective by its terms February first, 1909, and,

Whereas, plaintiff considered itself aggrieved by the unfair, excessive, unreasonable and discriminatory rates imposed by defendant upon the shipment and carriage of sawlogs and that thereafter and on to-wit, the 24th day of April, 1909, certain complaints were filed before the Michigan Railroad Commission against the said defendant Detroit & Mackinac Railway Company by certain shippers, including plaintiff claiming that the said tariff known as M. R. C. 205 was unfair, excessive, unreasonable and discriminatory, and that said complaints were filed under and by virtue of the statu-es of Michigan, inter alia, regulating railroads and the transportation of persons and property in the state of Michigan, preventing unjust discrimination, insuring adequate service and creating the Michigan Railroad Commission, and

Whereas, acting under the complaints so made, the said Railroad Commission did thereafter and on to-wit, the 22nd day of October, 1909, and on the 3rd day of November, 1909, promulgate and give effect to two certain orders and findings, in words and figures
3 respectively, as follows:

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

Session of the Michigan Railroad Commission Held at Its Offices in the City of Lansing, on the 19th Day of October, A. D. 1909.

D-188.

F. W. GILCHRIST, CHURCHILL LUMBER COMPANY, ISLAND MILL LUMBER COMPANY, Complainants,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendants.

Complaint having been made by the above named complainants charging that the above named defendant by its public tariff now in effect for the transportation of logs to the city of Alpena, state of Michigan, is charging rates that are unjust, and discriminatory, and issue having been joined thereon by the said parties and a hearing having been had wherein the parties were present and represented by counsel and the evidence and arguments of counsel having been duly considered by the commission, the commission doth find that the matters alleged in the complaint are substantially true and that the rates charged for the transportation of logs in carload lots to said city of Alpena are unjust, unreasonable and excessive, and that said rates should be reduced as hereinafter set forth;

Now, therefore, by virtue of the authority vested in us by law, it is hereby ordered that the Detroit & Mackinac Railway Company do publish, file and put into operation so as to become effective twenty (20) days from the date of the service of this order on defendant, a tariff for the transportation of logs in carload lots to the said city of Alpena as follows:

Ten (10) miles or less not to exceed one dollar ($1.00) per thousand (1,000) feet;

4 Over ten (10) miles and not exceeding twenty (20) miles, not to exceed one dollar and thirty-three cents ($1.33) per thousand (1,000) feet;

Over twenty (20) miles and not exceeding thirty (30) miles, not to exceed one dollar and sixty-seven cents ($1.67) per thousand (1,000) feet;

Over thirty (30) and not exceeding fifty (50) miles, not to exceed two dollars ($2.00) per thousand (1,000) feet;

Over fifty (50) and not exceeding eighty (80) miles, not to exceed two dollars and thirty-three cents ($2.33) per thousand (1,000) feet:

Above rates to apply when the manufactured product is reshipped via defendant company's line, and when not so to be reshipped, that defendant company are authorized to collect in addition to said rate fifty cents (50c.) per thousand (1,000) feet, but if later reshipment is made over defendant company's line, they are to refund to each shipper the fifty cents (50c.) per thousand (1,000) feet collected, and,

It is further ordered, that the books of both defendant company and complainants (and all other shippers of logs affected by this order), shall show plainly the total of inbound shipments and the reshipment of the manufactured product; and,

It is further ordered, that these rates apply to all classes of logs transported by said defendant to said city of Alpena, within the distance above set forth.

GEORGE W. DICKINSON,
JAMES SCULLY,
*Commissioners.*

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

At a Session of the Michigan Railroad Commission Held at Its Offices, in the City of Lansing, on the 3d Day of November, A. D. 1909.

5 D-188.

F. W. GILCHRIST, CHURCHILL LUMBER COMPANY, ISLAND MILL LUMBER COMPANY, Complainants,

vs.

DETROIT & MACKINAC RAILROAD COMPANY, Defendant.

*Supplemental Order.*

An order having been heretofore made in the above entitled cause, on to-wit, the 19th day of October, A. D. 1909, prescribing the rate of carload shipments of logs to the city of Alpena originating on the defendant company's line, and it appearing to the Commission that the minimum to be applied in the application of the rates set forth in said order of October 19th, should be the same as set forth in defendant company's tariff, on file with the Commission, and described as M. R. C. No. 208, G. F. D. No. 560 (corrected), and

It further appearing that the rate applying to Fletcher's Dam (formerly Broadwell's Dam), situated on defendant company's line, should be the same as the rate to Alpena.

Now, therefore, by virtue of the authority vested in us by law, it is hereby ordered, that the said defendant company may charge a minimum rate per car on carload shipments covered by this order the same as now appears in defendant company's tariff, described as M. R. C. No. 208, G. F. D. No. 560 (corrected), now on file with this Commission, to-wit:

Not to exceed ten (10) miles, three dollars ($3.00) per car;
Not to exceed twenty (20) miles, four dollars ($4.00) per car;

Not to exceed thirty (30) miles, five dollars ($5.00) per car;

Not to exceed fifty (50) miles, six dollars ($6.00) per car;

6 Not to exceed eighty (80) miles, seven dollars ($7.00) per car;

Not to exceed one hundred (100) miles, eight dollars ($8.00) per car.

Not to exceed one hundred and twenty-five (125) miles, nine dollars ($9.00) per car.

Not to exceed one hundred and fifty (150) miles, ten dollars ($10.00) per car.

And it is further ordered, that on all carload shipments of logs or pulp wood originating at points at defendant company's line of railroad north of Fletcher's Junction the rate to Fletcher's Dam (formerly Broadwell's Dam) shall be the same as the rate to Alpena, and that on all carload shipments of logs or pulp wood originating at points on defendant company's line of railroad south of Alpena the rate to Fletcher's Dam (formerly Broadwell's Dam) shall be the same as the rate to Alpena.

This order may be rescinded, altered or amended at any time when, in the judgment of the Commission such action should be taken.

CASSIUS W. GLASGOW, *Chairman;*
GEORGE W. DICKINSON,
JAMES SCULLY,
*Commissioners.*

And, whereas, the defendant being dissatisfied with the orders of the Commission aforesaid, heretofore, to-wit, on the 20th day of November, 1909, filed its bill of complaint in the circuit court for the county of Wayne, in chancery, to set aside the orders of the Commission aforesaid, and thereafter to-wit, on the 11th day of February, 1911, a decree was made and entered in and by the said circuit court for the county of Wayne, in chancery, dismissing the said bill of complaint, all of which will more fully appear by the terms of said decree and by the files and records in the said action, to which reference is hereby made.

7 And, whereas, defendant thereafter appealed from the decree of the circuit court for the county of Wayne in chancery, aforesaid, to the supreme court of the state of Michigan, and after due hearing a decree was entered by the supreme court aforesaid, affirming the said decree of the circuit court, for the county of Wayne, in chancery, all of which will more fully appear by the records, files and decree aforesaid, to which reference is hereby made.

And whereas, thereafter, to-wit, on or about the 17th day of August, 1912, the defendant filed a bill of complaint in the District Court of the United States for the Eastern District of Michigan, Southern Division, sitting in equity by which bill of complaint, it was sought to set aside and nullify the findings and orders of the Commission aforesaid, and the decrees aforesaid, as in violation of the provisions of the Constitution of the United States.

And whereas upon the denial of an injunction in such action an appeal was taken to the supreme court of the United States, and the order of the district court affirmed and thereafter, on to-wit, the twenty-eighth day of December, 1914, a decree was entered in the district court aforesaid, dismissing the said bill of complaint, all of which will more fully appear by the orders and decrees aforesaid, and the files and records *is* said action, to all of which reference is hereby made.

And whereas, thereafter, to-wit, on the 25th day of July, 1914, upon an application made by the plaintiff and others to the supreme court of the state of Michigan, a mandatory order was issued commanding the defendant herein to forthwith put into full
8 force and effect the three several orders of the Railroad Commission aforesaid, all of which will more fully appear by the order aforesaid, and by the records and files in said action, to which reference is hereby made, by reason whereof the defendant heretofore, to-wit, on the 18th day of February, 1915, issued and put into force a certain freight tariff in the words and figures following, to-wit:

No supplement to this tariff will be issued except for the purpose of cancelling the tariff.

M. R. C. No. 451. Cancels M. R. C. No. 450. Re-issue—Reduction.

Mackinac Route. Detroit & Mackinac Railway Co.

G. F. D. No. 775-A. Cancels G. F. D. No. 775.

*Local Freight Tariff on Logs.*

Shipped in carload lots from stations on the Detroit & Mackinac Railway to Alpena, Mich., and Fletcher's Dam, Michigan.

Governed except as otherwise provided herein, by Official Classification No. 42, I. C. C. O. C. No. 42, M. R. C. O. C. No. 42, issued by R. N. Collyer, Agent, (D. & M. Ry. G. F. D. No. 702F.) supplements thereto and reissues thereof and by Exceptions to said classifications, I. C. C. No. 406, M. R. C. No. 79, issued by E. Morris, Agent, (D. & M. Ry. G. F. D. No. 675 F) supplements thereto and reissues thereof.

Issued February 18, 1915. Effective February 19, 1915.

This tariff is filed and published in obedience to the orders of the Supreme Court of Michigan, and order of Michigan Railroad Commission, D. 188, dated October 19, 1909, also supplemental order D. 188 rated November 3, 1909.

Issued by

W. G. MacEDWARD,
(300.) *General Freight Agent, Bay City, Mich.*

*Rates on Logs (Carloads) from Stations on D. & M. Ry. to Alpena and Fletcher's Dam, Mich.*

9 Ten (10) miles or less, not to exceed one dollar ($1.00) per 1,000 feet.

Over ten (10) miles and not exceeding twenty (20) miles not to exceed one dollar and thirty-three cents ($1.33) per thousand feet.

Over twenty (20) miles and not exceeding thirty (30) miles, not to exceed one dollar and sixty-seven cents ($1.67) per thousand feet.

Over thirty (30) miles and not exceeding fifty (50) miles not to exceed two dollars ($2.00) per thousand (1,000) feet.

Over fifty (50) miles and not exceeding eighty (80) miles, not to exceed two dollars and thirty-three cents ($2.33) per thousand (1,000) feet.

Above rates to apply when the manufactured product is reshipped via the Detroit & Mackinac Railway Company, and when not to be so reshipped, the railway company will collect in addition to the above rates fifty (50c.) cents per thousand feet, but if later reshipment is made over the Detroit & Mackinac Railway, the company will refund to such shipper the fifty — (50c.) per thousand feet collected.

NOTE.—It is the order of the Michigan Railroad Commission that the books of the Detroit & Mackinac Railway Co. and the shippers of logs operating under this tariff shall show plainly the total of inbound shipments and the reshipment of the manufactured product.

To enable the Detroit & Mackinac Ry. Co. to check outbound shipments of lumber against inbound shipments of logs shippers operating under the tariff will show on bills of lading the number of feet of lumber on each car so shipped.

The above apply to all classes of logs transported by the Detroit & Mackinac Railway to the city of Alpena, Mich., and Fletcher's Dam, Mich., within the distances above set forth.

Minimum Rates per Car.

| | |
|---|---|
| Not to exceed 10 miles | $3.00 per car; |
| Not to exceed 20 miles | 4.00 per car; |

10

| | |
|---|---|
| Not to exceed 30 miles | 5.00 per car; |
| Not to exceed 50 miles | 6.00 per car; |
| Not to exceed 80 miles | 7.00 per car; |
| Not to exceed 100 miles | 8.00 per car; |
| Not to exceed 125 miles | 9.00 per car; |
| Not to exceed 150 miles | 10.00 per car. |

This tariff is governed by D. & M. Ry. G. F. D. No. 565-E, M. R. C. No. 377, as to facilities, prepayment of freight charges and mileage between stations on the Detroit & Mackinac Ry.

And Whereas, during all the time which elapsed between the findings and orders of the Railroad Commission aforesaid, and the making of the new tariff last aforesaid, defendant required and compelled plaintiff to pay for the carriage of its forest products, freight rates which were excessive, unreasonable, unjust and discriminatory, and in excess of the lawful rates as fixed and established by the findings, orders and decrees aforesaid.

And, whereas, during all of the time aforesaid, plaintiff paid such excessive rates under compulsion, for the purpose of reducing plaintiff's damages, and as the only means by which it could obtain shipment of forest products which were essential to the operation of plaintiff's mill.

And plaintiff says that by reason of the premises, defendant heretofore to-wit, on the 19th day of October, 1909, became and was charged with an obligation imposed by law to accept, haul, and deliver for plaintiff all forest products shipped or tendered for shipment, at the rates fixed by the orders of the commission aforesaid and to return and repay to the plaintiff on demand all sums received in excess of the rates so fixed.

11 And plaintiff says that by reason of the promises, defendant heretofore, to-wit, on the first day of April, 1915, at Bay City, in said county of Bay, became and was indebted to the plaintiff in a large sum, to-wit, in the sum of Thirty-four Thousand Dollars ($34,000.00) being the excessive and discriminatory amount paid to and exacted and retained by defendant, for the shipment and carriage of a large quantity of saw logs, to-wit, $32,611,879 feet, at rates fraudulently and arbitrarily fixed by said defendant, and in excess of the legal rates for the transportation of saw-logs, and in excess of a fair and reasonable rate for the transportation of said saw-logs.

And thereupon the defendant afterwards and on the day and year aforesaid, in consideration of the premises, then and there promised the plaintiff to pay it the said sum- of money respectively, on request, yet the said defendant has disregarded its said promises and has not (although often requested to do so) paid any of the said sums of money, or any part thereof, to plaintiff's damage of thirty-four thousand dollars ($34,000.00) and therefore it brings suit.

Also for that Whereas, at the time of the grievances hereinafter mentioned and referred to, the situation, condition and relations of the parties hereto were as alleged and described in the first count hereof, which allegations and descriptions are hereby referred to and made a part of this count.

And Whereas, by the terms of the orders of the Railroad Commission aforesaid, the payment and collection of a portion of the freight rates established by the said orders, to-wit, the sum of fifty cents (50c.) per thousand feet on logs of all kinds and classes, was

12 made conditional upon the failure of the shipper to reship by rail the product manufactured from the saw-logs originally so shipped, into Alpena. And,

Whereas, from and after the date of the last order of the Commission aforesaid, to-wit, the 3rd day of November 1909, and from thence hitherto, plaintiff as a condition of the shipment of its forest products, has been compelled by defendant, unlawfully and in violation of the terms of the said orders aforesaid, to pay the excess sum of fifty cents per thousand feet upon all forest products shipped and consigned to the plaintiff at Alpena, Michigan, including those of which the manufactured product was intended to be and was reshipped over the defendant's railway, the sum so paid being unlawfully exacted and retained by the defendant.

And plaintiff says that heretofore, to-wit, on the first day of April, 1915, at to-wit, Bay City, in said county, defendant became and was indebted to the plaintiff in a large sum, to-wit the sum of Nine Thousand Dollars ($9,000.00) being the excessive amount paid by plaintiff to and unlawfully exacted and retained by defendant at the rate of 50 cents per thousand feet on a large quantity to-wit, 18,000,000 feet of logs shipped to the plaintiff at Alpena, Michigan,, the manufactured product of which had been there-fore reshipped by plaintiff over the line of defendant's railroad.

And thereupon, the defendant afterwards and on the day and year aforesaid, in consideration of the premises, respectively, then and there promised to plaintiff to pay it the said sum of money on request,
yet the said defendant has disregarded its said promises and
13 has not (although often requested so to do) paid the said
sum of money or any part thereof, to plaintiff's damage of Forty Three Thousand Dollars ($43,000.00) and therefore it brings suit.

And also for that whereas, the defendant heretofore to-wit, on the 1st day of April, 1915, at Bay City, in said county of Bay, was indebted to the plaintiff in the sum of forty-three thousand dollars for the price and value of goods then and there sold and delivered by the plaintiff to the defendant, at its request.

And in like sum for the price and value of work then and there done and materials for the same provided by the plaintiff for the defendant at its request.

And in like sum for money then and there lent by the plaintiff to the defendant, at its request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendant, at its request.

And in a like sum for money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendant to the plaintiff on an account stated between them.

And thereupon, the said defendant afterwards, and on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiff to pay it the said several sums of money respectively, on request; yet the said defendant has disregarded its said promises, and has not (although often re-
14 quested so to do) paid any of the sums of money, or any part
thereof; to plaintiff's damage of Forty-three Thousand Dollars ($43,000.00), and therefore it brings suit, etc.

GILLETT & CLARK,
*Attorneys for Plaintiff.*

Business Address, Shearer Building, Bay City, Mich.

### *Rule to Plead.*

On filing the within declaration in this cause pursuant to the statute authorizing the commencement of suits by declaration, and on motion of Gillett & Clark, attorneys for plaintiff, it is ordered that defendant in said cause appear and plead to said declaration within fifteen days after service upon it of a copy thereof, and of notice of this rule, or judgment, etc.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

To Mr. James McNamara, Attorney for Defendant:

### *Motion to Dismiss for Want of Jurisdiction.*

(Filed May 4th, 1915.)

Gillett & Clark, Plaintiff's Attorneys.

15 The defendant, the Detroit & Mackinac Railway Company, by James McNamara and Henry and Henry, its attorneys, moves the court to dismiss this case for want of jurisdiction on the following grounds:

1. It appears by the declaration in this cause that the corporation plaintiff is located and has its principal office in the city of Alpena, in Alpena County, Michigan, and that the Detroit & Mackinac Railway Company has its principal office in the same city and county.
2. It appears by the plaintiff's declaration that the plaintiff is not located in or a resident of the county of Bay, and that the defendant is not located in or a resident of the county of Bay.
3. Service of process upon an officer of the defendant in the county of Bay is not sufficient to confer jurisdiction.
4. To sustain jurisdiction in this case would be contrary to the ruling of the supreme court of the state in Haywood vs. Johnson, 41 Mich. 598, and other decisions of this court.

This motion is based upon the plaintiff's declaration and the service of process thereof.

JAMES McNAMARA,
HENRY & HENRY,
*Attorneys for Defendant.*

## *Demurrer.*

(Filed May 12, 1915.)

16 The defendant, the Detroit & Mackinac Railway Company, by James McNamara, its attorney, says that the special counts of the plaintiff's declaration are not sufficient in law and the special reasons in matters of substance and form, and the grounds of this demurrer are as follows:

### I.

The common law remedies for irregular, exorbitant, unreasonable or excessive charges or exactions by common carriers for the transportation of freight between points in Michigan have been abrogated and abolished by subdivision (*g*) of Section 10, of Acts No. 300, Public Acts 1909, pp. 704, 715, as re-enacted by Act No. 139, Public Acts 1911, pp. 205, 209, the same being the acts of the legislature of this state, defining and regulating common carriers and creating the Michigan Railroad Commission.

### II.

The plaintiff seeks reparation without having made any complaint to the Michigan Railroad Commission under said subdivision (*g*); and the special counts of its declaration do not know that complaint has been made to the commission, or that the commission has made any findings or orders on complaints made under said subdivision.

### III.

It appears by the special counts of the plaintiff's declaration that the orders therein set forth of October 22nd, 1909, and November 3rd. 1909, were not put in force by filing a schedule or tariff until February 18th, 1915, and that the plaintiff's cause of action
17 is for alleged excessive charges before that date.

### IV.

It does not appear by the plaintiff's declaration that the order therein set forth of October 19th, 1909, was ever put in force by the filing of a tariff or otherwise.

### V.

No cause of action is set forth in the special counts of the plaintiff's declaration.

## VI.

The plaintiff's bill of particulars shows that it has no cause of action under the common counts of the declaration, other than the alleged causes of action in the special counts.

Wherefore the defendant prays that this its demurrer may be sustained and the plaintiff's action dismissed with costs and the defendant prays judgment accordingly.

JAMES McNAMARA,
*Attorney for Defendant.*

2025-31 Dime Bank Bldg., Detroit, Mich.

### *Certificate of Counsel.*

This is to certify that I, James McNamara, the counsel having principal charge of the cause in behalf of the Detroit & Mackinac Railway Company, the party filing the above—foregoing demurrer, do certify that the demurrer is not interposed for delay, and that in my opinion it is well founded.

JAMES McNAMARA,
*Attorney for Defendant.*

18 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

### *Amendment of Plaintiff's Declaration.*

Plaintiff hereby amends its declaration filed herein, by making the folliwing additions, viz:

On page nine of said declaration, at the end of the first count thereof, the following is inserted,.viz:

"By reason whereof and of the provisions of Section 19 of Act No. 300 of the Public Acts of 1909, defendant became liable to plaintiff in double the amount of damages so sustained, to plaintiff's damage of sixty-eight thousand dollars ($68,000.00), and therefore it brings suit."

On page eleven of the said declaration, at the end of the second count thereof, the following is inserted, viz:

"By reason whereof and of the provisions of Section 19 of Act No. 300 of the Public Acts of 1909, defendant became liable to plaintiff in double the amount of damages so sustained, to plaintiff's damage of eighty-six thousand dollars ($86,000.00), and therefore it brings suit."

Also on page twelve of said declaration, at the end of the common counts, the following is inserted, viz:

"By reason whereof and of the provisions of Section 19 of
19 Act No. 300 of the Public Acts of 1909, defendant became
liable to plaintiff in double the amount of damages so sustained, to plaintiff's damage of eighty-six thousand ($86,000.00) dollars, and therefore it brings suit."

Also a new count is added at the end of the said declaration as follows, to-wit:

"Also for that whereas, the defendant heretofore to-wit, on April 1, 1915, at Bay City, in said County of Bay, was indebted to plaintiff in the sum of forty-three thousand ($43,000.00) dollars for damages sustained by plaintiff in consequence of defendant's omission to do certain acts required to be done by it, by the lawful orders of the Michigan Railroad Commission made under the provisions of Act 300 of the Public Acts of Michigan for the year 1909, and in consequence of the violation by defendant of lawful orders made by the Michigan Railroad Commission under the provisions of the said act, the nature of such omissions and violations being more particularly described, recited and alleged in the preceding counts of this declaration, all of which descriptions, recitals and allegations are hereby referred to and made a part of this count, with the same force and effect as if repeated herein.

And whereas, by virtue of the provisions of Section 19 of Act No. 300 of the Public Acts of Michigan of the year 1909, the defendant then and there became liable to the plaintiff in double the amount of damages sustained in consequence of such violation, to-wit, the sum of eighty-six thousand ($86,000.00) dollars.

And thereupon, the said defendant afterwards and on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiff to pay, it the said sum of
money, on request, yet the said defendant has disregarded
20 its said promises and has not (although often requested to
do so) paid the said sum of money or any part thereof, to plaintiff's damage of eighty-six thousand ($86,000.00) dollars, and therefore it brings suit, etc.

GILLETT & CLARK,
*Plaintiff's Attorneys.*

Business Address: Shearer Bldg., Bay City, Michigan.

To James McNamara, Attorney for Defendant.

SIR: Take notice that the above is a true copy of the amendments to plaintiff's declaration herein this day filed by virtue of the provisions of Circuit Court Rule 10.

Yours, etc.,

GILLETT & CLARK,
*Attorneys for Plaintiff.*

Dated May 18, 1915.

## *Order Denying Motion to Dismiss.*

(Filed May 20, 1915.)

The motion of said defendant to dismiss the cause for want of jurisdiction having come on to be heard, and after due deliberation it is ordered that the same be and is hereby denied.

21 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

## *Exception.*

Now comes the Defendant and excepts to the order of the Court denying its motion to dismiss.

JAMES McNAMARA,
HENRY & HENRY,
*Attorneys for Defendant.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

## *Motion for Change of Venue.*

Now comes the said defendant by James McNamara, its attorney, and moves the court to change the venue of this case by transferring the cause for trial to the circuit court of the county of Alpena and for the following reasons:

1. The alleged cause of action of the plaintiff arose in the county of Alpena. 22

2. All the principal witnesses of each of the parties to this cause reside in the county of Alpena.

3. This cause should have been commenced in the county of Alpena.

This motion is based on the plaintiff's declaration and on the files and records in the case and on the affidavit of James McNamara, herewith filed.

Dated Detroit, Mich., May 25th, 1915.

JAMES McNAMARA,
*Attorney for Defendant.*
FRED A. BAKER,
*Of Counsel.*

To Gillett & Clark, Attorneys for the Plaintiff:

You will please take notice that a motion of which the within and foregoing is a true copy was filed and entered in the within entitled cause on this the 25th day of May, 1915, and you are also herewith served with a copy of the affidavit of James McNamara therein mentioned.

You will also take notice that said motion will be brought on for argument on the 5th day of June, 1915, at the opening of court on that day or as soon thereafter as counsel can be heard.

Dated May 25th, 1915.

JAMES McNAMARA,
*Attorney for Defendant.*
FRED A. BAKER,
*Of Counsel.*

23 STATE OF MICHIGAN,
*County of Wayne, ss:*

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

James McNamara, being duly sworn, deposes and says that he is the attorney for the defendant in the above entitled cause; that he is familiar with the facts which form the basis of the plaintiff's alleged cause of action; that the cause of action arose in the county of Alpena and the principal witnesses of both of the parties reside in the county of Alpena; that the plaintiff and the defendant are both located and a resident in the city of Alpena in the county of Alpena and a trial of any issue of fact in the cause can be more conveniently tried in the county of Alpena than in any other county in this state.

JAMES McNAMARA.

Subscribed and sworn to before me, a notary public, on this the 25th day of May, A. D. 1915.

IRMA GREIMER,
*Notary Public, Wayne County, Mich.*

My commission expires March 15, 1916.

24 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

*Opinion of Circuit Judge Overruling Demurrer.*

(Filed June 30, 1915.)

In this action the plaintiff has filed a declaration alleging that its place of business is Alpena, and that it ships freight from points on the line of defendant's road to Alpena; that in November, 1909, on its application, orders were made by the Michigan Railroad Commission, fixing the rate on freights from certain points to Alpena, pursuant to the provisions and powers given to the Commission by Act No. 300 of the Public Acts of 1909 as amended.

That pursuant to the provisions of said statute the question of the reasonableness and legality of these orders was presented to the supreme court of Michigan, which by its decree decided that the orders were rightfully made and of legal effect and force, following which the question was presented to the supreme court of the United States, which court affirmed the action of the supreme court of Michigan, following which in proceedings for contempt the supreme court of Michigan further confirmed its first decision.

It is the claim of plaintiff that while these orders were in 25 force and under litigation as above described, it shipped freight from the points above referred to to Alpena, and paid thereon the rates exacted by the defendant, which rates were in excess of the rates fixed by said orders, and to collect the amount of this excess, that is, the difference between the amount exacted and paid and the amount fixed by said orders, the plaintiff has brought this action of assumpsit, claiming that this excess was money in the hands of the defendant belonging to it.

The declaration also shows that in February, 1195, the defendant filed and published a tariff in obedience and compliance with the decree of the supreme court of Michigan and said Railroad Commission orders.

To this declaration the defendant has filed a demurrer setting forth the following grounds:

(*a.*) That the plaintiff is not entitled to maintain this action for money paid as excessive charges, because the common law remedy of the plaintiff invoked by said declaration has been abrogated and abolished by subdivision (*g*) of section 10 of said act.

(*b.*) That compliance with the provisions of said subdivision (*g*) of said section has not been had, in that no complaint was made to the commission under said subdivision by plaintiff before the commencement of this suit, and that such action under said subdivision is a requisite condition precedent to the maintenance of such suit.

(*c*) That it is a necessary condition requisite to the commencement of this suit that a tariff should be filed by the defendant to comply with the orders aforesaid; and that such tariff was not filed until February 18, 1915, and that this tariff not being so filed no
26 recovery could be had on account of excess freights prior to that date.

The disposition of these questions requires a thorough consideration of said chapter 300 as amended, and the object and purpose of said statute and certain specific provisions thereof.

It plainly appears that this statute introduces new elements, circumstances and conditions in the relations between railroad companies and their shipper patrons, and that it gives to the patrons under certain conditions rights and remedies not given by the common law.

It is fundamental and elementary that where a statute gives rights or remedies not theretofore given by the common law such rights and remedies are to be considered as cumulative and not as abrogating the common law rights and remedies, unless the statute giving those remedies either by express terms or by clear inference abrogates such common law rights and remedies. And the question under consideration is whether or not the statute in question either expressly or by fair inference abrogates such common law rights.

Upon this question as to whether or not the act directly or by inference takes away a right or remedy before that enjoined by a shipper, the general intention and purpose of the act is a controlling feature, because I believe it to be a settled principle of statutory construction, in this state that where an act or series of acts show a primary object to be carried out, the general intention of the legislature as shown by the act or acts will be carried out regardless of circumstances. That correct rules of grammatical construction, standard rules of definition of words, and recognized general rules of statutory construction might singly or together lead to a different conclusion.

27 Ploff vs. Bangor Township, 168 Mich. 697.
Drake vs. Industrial Works, 174 Mich. 622.
Hartingh vs. Bay Circuit Judge, 176 Mich. 296.

From an examination of this statute I fail to find any purpose of the legislature to take away from any shipper any right theretofore enjoyed by him. From such examination I find a well-defined purpose to give a shipper under certain conditions rights and remedies not theretofore enjoyed by him. Any one of the rights given by the statute is the right to have the commission fix a legal rate on a given commodity between indicated points as between a railroad company and a shipper. The fixing of such rate is by an order of the commission and is prima facie lawful and reasonable until found otherwise, pursuant to a provision of section 26, or modified under section 24. This rate when settled by a court decision under the provisions of section 26 becomes an adjudication and final, so that in a controversy thereafter between a shipper and the company upon the point of the reasonableness or unreasonableness of the rate, the order so settled by the court is an adjudication, and one of the main objects of the bill is to produce this result. The effect of this is to make an adjudication upon a commodity rate between points for the future until the rate is modified pursuant to law, and in this way one adjudication would take the place of many controversies and tend to prevent many law suits.

But there is nothing in the giving of this right and remedy which in and of itself takes from a shipper a remedy theretofore enjoyed
by him. In point of actuality it favors the common law
28 remedy by suit, in that it substitutes the order of the commission approved by the court for the verdict of the jury on the adjudicated rate.

From a consideration of the whole act it is my opinion that upon point under consideration the common law remedy of the shipper to sue for the excessive charges paid and recover the same in an action of assumpsit is not taken away.

Sections 40, 46 and 47 are referred to by counsel, it being claimed on the one hand that these sections show that said common law remedy is preserved, and upon the other hand that they do not have this effect. It may be that these provisions do not have the specific effect of reserving said common law right to sue for excessive rate freight payments, but they certainly do not contain either separately or collectively any provision which opposes or tends to abrogate such right, and it appears to me that considering the effect of these three sections separately or together they tend to show the legislative intention to preserve the common law right described.

Referring specifically to the claim that paragraph *g*, section 10, abrogates a common law remedy of the shipper, attention is called to the following elements of the act. Sections 22, 23, 24, 25, 26 and 27 provide machinery for making what might be termed a working program for future services as between a railroad company and a shipper; they providing for a full hearing and a fixing of the future rates for commodities between given points; they provide a specific method for the review of that order and its confirmation, modification, or disaffirmance by a court. There is no provision made therein for the fixing of a rate for past excessive charges.

On the other hand section 10 requires a railroad company
29 to make and file and publish a tariff of rates which shall be in
force for a certain time after publication. The rate fixed by this tariff is presumed to be reasonable until it is otherwise made to appear.

As a part of the machinery of Se. 10 it is provided by Sec. 10 (*g*) that notwithstanding the fixing of the rate by the Co. and notwithstanding such rate is presumed reasonable and fair, notwithstanding the freight so fixed has been paid, that even within six months after the delivery of any shipment of freight at destination any shipper may attack the reasonableness of the rate he has before that recognized, before the commission. This attack is made through a hearing and determination of the commission as to whether the rate before that exacted was irregular or exorbitant, and as to what would have been a reasonable rate, and provides that if the reasonable rate is found to be less than the exacted rate the railroad company should be required to refund, and permits a shipper in that case to sue for the excessive exacted amount before that paid by him, and in such suit the order of the railroad company is treated as prima facie correct, but no railroad company sued under such conditions shall be liable for any penalty or forfeiture, or subject to any prosecution under the laws of this state on account of making such refund.

Paragraph *g* refers to section 22 for a part of the procedure to be used in fixing the rate that shall be reasonable and lawful, but in my opinion paragraph — was intended to provide for cases and conditions which it was assumed —, and in fact were not, provided for by section 22, and gives a remedy different from that provided by section 22, and neither modifies or in any way affects the provisions of section 22 or the proceedings thereunder, or takes away any common law right of any shipper. 30

I am of the opinion that the filing of a tariff by defendant was not a condition precedent to a suit for excess freight by the plaintiff, and that the failure of the defendant to sooner file a tariff and comply with the order of the Railroad Commission has no effect whatever on plaintiff's right or remedy under the statute.

I have carefully considered the point made against plaintiff's claim based on the Interstate Commerce Act and the decisions of the supreme court of the United States construing the same.

Without going into detail as to the reasons therefor I am of the opinion that the conditions and circumstances and general purpose of the two acts so far as this particular question is concerned, are so manifestly different that the United States supreme court decisions are not applicable to our statute.

For the foregoing reasons the demurrer is overruled.

C. L. COLLINS,
*Circuit Judge.*

31 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

*Reasons for Denying Motion for Change of Venue.*

(Filed June 30, 1915.)

This case was brought to issue by the filing of a demurrer. A motion for a change of venue has been made in the case, but this motion was not filed until or more than ten days had intervened between the case coming to issue and the filing of the motion for a change of venue.

Circuit Court Rule 58 provides that motions for change of venue in any civil cause shall be entered and notice of hearing served within ten days after the cause shall be at issue.

I am bound to follow this rule and in doing so deny the motion for a change of venue.

C. L. COLLINS,
*Circuit Judge.*

### *Order Denying Change of Venue.*

(Filed July 7, 1915.)

A motion having been heretofore made on the part of the defendant in this cause that a change of venue be granted by transferring said cause for trial to the circuit court for the county of Alpena, after hearing counsel for the respective parties it is 32 ordered that said motion be and the same is hereby denied, and that plaintiff is hereby awarded an attorney fee of ten dollars as costs of said motion to be taxed.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff; CHURCHILL LUMBER COMPANY

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Now comes the defendant and excepts to the order of the court denying its motion for change of venue.

JAMES McNAMARA,
HENRY & HENRY,
*Attorneys for Defendant.*

### *Order Overruling Demurrer.*

(Entered July 7, 1915.)

This cause having been duly brought on for argument on the demurrer of said defendant to plaintiff's declaration, and all and singular the premises being seen and by the court now fully understood and due deliberation having been thereupon had, and it appearing to the said court that the declaration of said plaintiff, and the matter therein contained was sufficient in law for the said plaintiff to have and maintain its aforesaid action thereof against 33 said defendant, it is ordered that the said demurrer be and the same is hereby overruled with costs to plaintiff to be taxed including an attorney fee of ten dollars, and that defendant have leave to plead to said declaration within ten days from the entry of this order.

C. L. COLLINS,
*Circuit Judge.*

STATE OF MICHIGAN:

In the Supreme Court.

RICHARDSON LUMBER COMPANY, Plaintiff and Respondent,
vs.
DETROIT & MACKINAC RAILWAY COMPANY, Defendant and Relator.

*Application for Writ of Certiorari and Denial Thereof.*

(Filed July 12, 1915; Denied July 23, 1915.)

On the 12th day of July, 1915, an application was made to the supreme court of the state of Michigan for a writ of certiorari requiring the circuit court for the county of Bay to return to said supreme court all proceedings had and taken in the cause above entitled, wherein the defendant had demurred to the declaration of the plaintiff and said circuit court had overruled said demurrer, and to show cause why an order should not be made in this court sustaining such demurrer, and for this court to review all proceedings in connection with such demurrer according to the statutes and rules and practice controlling the same.

That such application was filed in this court on the 12th day of July, 1915.

34 That on the 23rd day of July, 1915, a memorandum was filed in the supreme court denying said petition and application, no opinion being filed in connection therewith. The following certificate from the clerk of said court indicates the disposition made of such application:

*Certificate of Clerk of the Supreme Court.*

Supreme Court of the State of Michigan.

Cal. No. Cir. Ct. 10211; Cal. No. Sup. Ct. 26896½

ISLAND MILL LUMBER COMPANY, Plaintiff,
vs.
DETROIT & MACKINAC RAILWAY CO., Defendant and Appellant.

IN THE SUPREME COURT, *ss:*

I, Jay Mertz, clerk of the supreme court, and keeper of its records and seal, hereby certify that in the above entitled cause a petition for a writ of certiorari was filed on the 12th day of July, 1915, and that a memorandum was filed on the 23rd day of July, 1915, denying said petition; and further that no opinion was filed in the matter.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court at Lansing, this 29th day of March, A. D. 1917.

[SEAL.] JAY MERTZ, *Clerk.*

35 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

*Plea and Notice.*

(Filed July 23, 1915.)

And now comes the above named defendant by James McNamara, its attorney, and demands a trial of the matters set forth in plaintiff's declaration.

JAMES McNAMARA,
*Attorney for Defendant.*

2026-31 Dime Bank Bldg., Detroit, Mich.

To said Plaintiff:

You will take notice that at the trial of the above entitled cause the defendant will insist and prove under the general issue above pleaded that the rates fixed by the said orders of October 19th, October 22nd and November 3d, 1909, are unreasonable and confiscatory in that said rates are not sufficient to cover the cost of hauling logs in carload lots from logging branches to the city of Alpena and that said rates have been shown by practical experience to seriously impair the net profits and income of the Detroit & Mackinac Railway Company and said rates violate the provisions of the Fourteenth Amendment of the Constitution of the United States, that no state shall deprive any person
of life, liberty or property without due process of law nor
36 deny to any person within its jurisdiction of the equal protection of the laws.

On the trial of the case the defendant will invoke against the alleged causes of action of the plaintiff the protection of said constitutional provisions.

JAMES McNAMARA,
*Attorney for Defendant.*

The following amendments were thereafter made to defendant's plea and notice by stipulation of counsel:

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

*Amended Plea and Notice.*

(Filed Sept. 6-8, 1916.)

The defendant comes and demands a trial of the matters set forth in the plaintiff's declaration.

Notice.

Special and Affirmative Defenses.

The defendant gives notice that on the trial of this cause, if incumbent upon it in that behalf, it will submit evidence relative to and insist upon the following special and affirmative defenses; and gives further notice that pursuant to Circuit Court Rule No. 37 23 it hereby indicates the nature of such special and affirmative defenses relied upon, viz:

First.

The rates fixed by the Michigan Railroad Commission's orders of October 19th, October 22nd and November 3rd, 1909, (specified in the plaintiff's declaration), are unreasonable, illegal and confiscatory in that said rates are not sufficient to cover the cost of hauling logs and other forest products in carload lots from logging branches of the said defendant railroad to the city of Alpena, and logs and other forest products in carload lots and otherwise between said city and Broadwell's Dam, and that said rates have been shown by practical experience to seriously and prohibitively impair the net profits and income of said defendant.

Second.

That said rates violate the provisions of the Fourteenth Amendment of the Constitution of the United States, in that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

### Third.

That the orders of the Michigan Railroad Commission set forth in the plaintiff's declaration as of date October 19th, October 22nd and November 3rd, 1909, were not in force and were inoperative and non-controlling until the 18th day of February, 1915, at which
38 time said defendant issued its tariffs, making such rates and orders operative.

### Fourth.

That on and after said orders were made by the Michigan Railroad Commission and between the dates of the several orders so made, the conditions prevailing on and along the various lines and tracks of said defendant's railroad, became and were changed in that the forest products constituting the subject matter of such orders fluctuated and became and were depleted and non-available for railroad transportation. Had such changed conditions obtained at and prior to the making of such orders different and higher tariff rates would have been made and would have been approved by the courts in their decrees, orders and determinations.

### Fifth.

That by reason of the changed conditions as to forest products along and tributary to the various tracks of the defendant railroad, since the proofs were taken upon which the orders heretofore referred to were based, and by reason of the increased cost of operating the defendant's railroad, maintenance and every other thing connected with the operation of the defendant's railroad, taken in connection with the fact that the defendant relied upon its published tariff; the giving effect to the orders above referred to from their dates instead of from the date of the making and posting of the tariffs thereafter, pursuant to court orders, would operate as confiscation of defendant's property, resulting in contravention of the spirit as well as the letter of all statutes and other laws controlling the operation of defendant's railroad.

39

### Sixth.

That the giving effect to the said orders of the Michigan Railroad Commission from their dates would constitute a discrimination in favor of the plaintiff in this suit and against all other shippers who accepted and were controlled by the rates and tariffs, posted and published pursuant to the statutes in such case made and provided.

### Seventh.

That the said orders of the Michigan Railroad Commission were in no wise controlling upon the defendant and were wholly inoperative until the final determination of all litigation relative thereto by virtue of a stipulation duly executed by the representatives of all parties interested, and relied on by this defendant, said stipulation bearing date December 2nd, 1909, entitled in the cause and reading as follows:

> "It is hereby stipulated by and between the attorneys for the respective parties hereto, that the application for an injunction and the order to show cause made by said court and the hearing thereon, may be and is hereby continued in its present state until the final determination of said cause upon the merits thereof.
>
> Dated this 2nd day of December, A. D. 1909.
>
> JOHN E. BIRD,
> *Attorney General.*
> JAMES McNAMARA,
> *Solicitor for Complainant."*

40 It being the purpose of the attorney general and the attorney for this defendant, the Detroit & Mackinac Railroad, that said stipulation should and did operate to continue in full force and effect all posted and published tariff rates for the transportation of forest products until by an order of the court of last resort said defendant should be required to post and publish other or different tariffs.

## Eighth.

Pursuant to said circuit court Rule No. 23 the defendant now here admits that on, to-wit, the 23rd day of November, 1909, and on the 11th day of March, 1909, and on the 24th day of April, 1909, certain parties filed three several petitions and complaints against this defendant with and before the Michigan Railroad Commission, therein alleging that they the said complainants considered themselves aggrieved by the asserted unfair, excessive, unreasonable and discriminatory rates, imposed upon them by the defendant with respect to the shipment and carriage of forest products; that thereafter said Railroad Commission issued three several orders or findings set forth in the declaration of the plaintiff hereinbefore referred to as orders of date October 19th, 1909, October 22nd, 1909, and supplemental order November 3rd, 1909, which said orders purport to have been made pursuant to Act No. 300 of the Public Acts of Michigan for the year 1909; this defendant now here expressly denies the allegations in the plaintiff's declaration that by virtue and reason of the issuance of said orders the said Michigan Railroad Commission "promulgated" and "gave effect" to such orders, and expressly denies that the allegations in the petition referred to warrant such orders; the defendant respectfully refers to its several answers made and filed to such petitions.

41

## Ninth.

This defendant admits that, conceiving itself aggrieved by such orders, filed its bill of complaint in the circuit court for the county of Wayne, in chancery, pursuant to the statute in such case made and provided for the purpose of reviewing all proceedings before then had in connection with such orders; that from the decree made therein by the circuit court for the county of Wayne, in chancery, defendant appealed to the supreme court of the state of Michigan, and thereafter instituted proceedings in the district court of the United States for the eastern district of Michigan, for the purpose of further reviewing the proceedings before then had in connection with such orders; it, the said defendant, thereafter appealing to the supreme court of the United States from the order and decree made by said district court. That thereafter said plaintiff applied to the supreme court of the state of Michigan for, and obtained a mandatory order of date February 18th, 1915, by the provisions of which said order the said defendant was required to and did publish, post and put in operation the freight tariff referred to in the plaintiff's declaration.

This defendant alleging that from the time of the filing of the three petitions hereinbefore referred to until the issuing of the mandatory order on the said 18th day of February, 1915, the subject matter of said petitions was in process of litigation and that by virtue of the proceedings so had and taken and by virtue of the stipulation hereinbefore referred to and particularly set forth, and by virtue of the statute and laws controlling the same, it, the said defendant, lawfully and rightfully operated its said railroad and transported forest products according to the published tariff, and was not required during said time to transport forest products according to any
42 other or different tariff of rates than the one so posted and published as aforesaid.

## Tenth.

That during the time which elapsed between the findings and orders of the Railroad Commission, aforesaid, and the posting and publishing of the new tariff on the 18th day of February, 1915, no proceedings were had or taken by or on behalf of the plaintiff to set aside or annul the stipulation hereinbefore set forth in detail, nor to require this defendant to make, post or publish any other or different tariff of rates for the transportation of forest products than that by which it was lawfully controlled during said time.

## Eleventh.

That on, to-wit, the 3rd day of November, 1909, the Michigan Railroad Commission made said Supplemental order in the cause entitled F. W. Gilchrist, Churchill Lumber Company, Island Mill Lumber Company, *com*plaintiff-, vs. Detroit & Macinac Railway Company, defendant, (D-188). That by the terms of such order it was provided as follows:

"This order may be rescinded, altered or amended at any time when in the judgment of the commission such action should be taken."

From the date of said order until the final determination by the courts such commission has never exercised its judgment to the end that such order has been or could be rescinded, altered, or amended; said commission not having been petitioned to so rescind, alter or amend said order by reason of the uncertainty of the final
43 determination of the issues so being litigated and for the further reason that no tariff of rates had been made, posted or published pursuant to such order; defendant therefort insists that by express provisions of the order, the same did not and could not become effective and operative as against the said defendant until the final determination of the litigation and the posting and publishing of the tariffs as aforesaid.

## Twelfth.

That the plaintiff did not reship over the defendant's railroad the manufactured product of the forest products shipped to its mill, by the said defendant entitling the said plaintiff to the said sum of fifty cents per thousand feet upon all forest products shipped to the plaintiff at Alpena as alleged in the declaration of the plaintiff.

## Thirteenth.

In event said commission's orders shall be adjudged efficacious, defendant alleges that pursuant to subdivision (*g*) Section 10, Act No. 300, Public Acts of 1909, the said plaintiff should have complained to the Michigan Railroad Commission, asserting that the defendant has exacted for the transportation of the forest products irregular or exorbitant charges; and the said plaintiff should have so complained (or petitioned) within six months from the date of such transportation; that by virtue of said law the said plaintiff could not institute proceedings for the recovery of irregular or exorbitant charges exacted at a time more remote than six months from the making of such complaint, and therefore the plaintiff cannot recover the demands made by it in its declaration and bill of particulars.

44

## Fourteenth.

That no proceedings have been had or taken by the plaintiff before the Michigan Railroad Commission to determine the amount, if any, of the excessive or irregular rates or charges exacted by the defendant from the plaintiff as alleged in the plaintiff's declaration; that no proceedings at law in the circuit court for the county of Bay can be maintained for the recovery of irregular, exorbitant or excessive charges until such amount, if any, has been found and determined by such Railroad Commission, all pursuant to said sub-diviion (*g*) of paragraph 10 of said Act 300 of the Public Acts of 1909.

## Fifteenth.

The defendant proceeding in good faith to adjudicate the legality of the said three orders of the commission, could not complain to said commission pending such adjudication and relying on the determination of the supreme court that the commission's findings were not conclusive and that they establish no more than a prima facie determination; defendant cannot be required to refund an amount to plaintiff equal to the difference between an established and a posted and published tariff of rates and an unposted and unpublished rate named in orders awaiting judicial approval.

### Sixteenth.

That the three several orders of the Michigan Railroad Commission referred to in the plaintiff's declaration, as of dates October 19, October 22 and November 3, 1909, (said orders being hereinbefore referred to), are void and voidable and cannot be recovered upon by
reason of Act 300 of the Public Acts of 1909, as amended, be-
45 cause said Michigan Railroad Commission had no jurisdic-
tion to make and issue such orders, and because the petitions required by the statute in such case did not make the statutory allegations required as a basis for the making of the orders referred to; and because the complaint before the Michigan Railroad Commission, dated April 21, 1909, upon which the orders of said commission of October 19, 22 and November 3, 1909, were based, charging a discrimination in log freight rates between points south of Cheboygan into Alpena and north of Alpena into Cheboygan, were equalized by a new tariff known as M. R. C. No. —, which became effective June 1st, 1909, and was effective, and equalized, and such alleged unjust discrimination absolutely removed before the hearing had on said complaint, June 3rd, 1909, and that there was no legal complaint before said commission upon which to base said orders as aforesaid, and hereinbefore referred to, and in force and effect, pub- — that said commission was without jurisdiction to make said orders, and the same became and was and are an invasion of the constitutional rights of said defendant, and in violation of the fourteenth amendment of the Federal constitution of the United States.

(See stipulation and Exhibit 12, p. 454, record of so-called "rate" case, supreme court of Michigan.)

### Seventeen.

That at the time of the making and issuing by the Michigan Railroad Commission of the orders heretofore referred to, designating a tariff of rates, such orders bearing dates October 19, October 22 and November 3, 1909, several certain tariff of rates on freight and forest products into and out of Alpena, being the tariff of rates in force at
and prior to the dates of such orders last hereinbefore referred
46 to, and in force and effect, published and posted, pursuant to
Section 10 of Act 300 of the Public Acts of 1909, and were designated as G. F. D. No. 147, dated Bay City, Michigan, November 20, 1903, set forth on page 447 of the printed record in the so-

called rate case, and M. R. C C. 198 of date January 7, 1909, to take effect January 19, 1909, set forth on pages 448 and 449 of the printed record in the so-called rate case, which said tariff of rates had been approved by the Michigan Railroad Commission. Also tariff of rates duly filed, posted and published, designated as M. R. C. 205, and M. R. C. 208, and M. R. C. 201, and all other tariff of rates for the transportation of freight and forest products to and from Alpena city, state of Michigan, posted, published and effective before and after and at the time the Michigan Railroad Commission made their orders of dates as aforesaid, October 19, October 22, and November 3, 1909.

Such tariff of rates will be offered in evidence and their contents established on the trial of these cases. The purpose of this notice is to comply with Rule 23 of Michigan Rules controlling circuit court cases relative to defense made by the defendant in this cause. Knowing that the plaintiffs and their attorneys are familiar with such existing tariff of rates, we do not herewith set forth such tariff of rates in detail. If required to do so, however, a copy of such posted, published and effective tariff of rates will be furnished to the attorneys for the plaintiffs at their request.

## Eighteenth.

That the defendant on the trial of the causes above entitled will insist and give evidence relative to all tariff of rates pertaining to the transportation of freight, logs and forest products into,
47 and the manufactured product therefrom out of the city of
Alpena, aforesaid, from the date of the three orders set forth in the plaintiff's declarations, and before and after such dates; that said plaintiffs have in no wise proceeded before the said railroad commission, nor in the courts to the end that such rates independent of the rates made on October 19, October 22 and November 3, 1909, have been cancelled or have become ineffective until on and after the 18th day of February, 1915.

The purpose of these amendments is to comply with Circuit Court Rule 23, and if the plaintiffs or their attorneys require other or further particulars of the rates hereinbefore referred to in order that defendant may comply with such rule, such data or papers, orders or tariffs will be supplied to said plaintiffs or their attorneys on request, or in case such plaintiffs or attorneys indicate in any wise the insufficiency of his supplemental amended plea.

The pleadings in this cause were originally made and filed prior to the adoption of the new rule controlling pleas and notices; and while to a certain extent this amended plea is made with an effort to comply with Rule 23, as now enforced, the said defendant does not herein waive any of its legal rights in connection with the making of the plea and notice of special affirmative defenses, but in an effort to avoid unnecessary expense incident to the proofs which shall submitted on the trial of this cause, it has endeavored to comply ith such rules as far as hereinbefore stated and set forth.

Respectfully submitted,

JAMES McNAMARA,
*Attorney for Defendant.*

Dated 22nd day of August, 1916.

Business address: 2026 Dime Bank Bldg., Detroit, Mich.

HENRY & HENRY,
*Of Counsel.*

Opera House Block, Alpena, Mich.

To Messrs. Gillett & Clark, Attorneys for Plaintiff. Business adess: Shearer Block, Bay City, Mich.

ATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

*Exceptions for Overruling Demurrer.*

(Filed October 30, 1915.)

Now comes the defendant, by James McNamara, its attorney, and enry, Henry & Henry, of counsel, and hereby excepts to the deion and ruling of the court made on the seventh day of July, 15, wherein said court overruled and disallowed the demurrer ore then interposed on behalf of the defendant to the declaration plaintiff.

Exception is also hereby taken by and on behalf of said defendant the reasons for overruling such demurrer filed in said cause on, wit, the 30th day of June, 1915.

JAMES McNAMARA,
*Attorney for Defendant.*

HENRY, HENRY & HENRY,
*Of Counsel.*

49 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

*Plaintiff's Bill of Particulars.*

Richardson Lumber Co.

Statement of Log Freights—1909-1914, Inc.

| Year. | Feet hauled. | Freight paid. | Claimed shld. have paid. | Feet reshipped. | Claimed overchrg. Net. |
|---|---|---|---|---|---|
| 1909 | 3,523,856 | 10,840.89 | 6,982.40 | 513.789 | 3,353.46 |
| 1910 | 6,261,213 | 19,307.53 | 12,972.05 | 1,464,029 | 3,936.89 |
| 1911 | 4,881,470 | 15,232.75 | 10,506.17 | 2,639,532 | 3,605.61 |
| 1912 | 6,164,690 | 18,983.86 | 12,110.68 | 3,866,869 | 5,724.27 |
| 1913 | 6,627,730 | 20,758.93 | 14,129.39 | 5,005,270 | 5,818.31 |
| 1914 | 5,152,920 | 16,111.94 | 10,671.97 | 3,190,890 | 4,458.95 |
| | 32,611,879 | 101,235.90 | 67,372.66 | 16,680,379 | 25,897.49 |

Interest will be added on net balances at the rate of five per cent per annum.

Log Shipments for the Year 1909.

(Here follow 22 pages of items under the following headings and with the following totals:)

| Expense bill number. | Car No. | From— Amt. charged. | No. feet on car. | Miles hauled. | Rate per M. | Shld. be Frt. |
|---|---|---|---|---|---|---|
| Total 1126 cars. . | | 10,840.89 | 3,523,856 feet | | | 6,982.40 |
| Should be ...... | | 6,982.40 | | | | |
| Overcharge ...... | | 3,858.49 | | | | |

| Date. | B.-L. No. | Car number. | Feet shipped. | Destination. |
|---|---|---|---|---|

Total shipments, 3,866,869.

50 Lumber Shipments for Year 1909.

(Here follow 1 page of items under the following headings and totals:)

| Date. | B.-L. No. | Car number. | Feet shipped. | Destination. |
|---|---|---|---|---|
| Total 1,126 cars—$10,840.89 | | | 3,523,856 feet | 6,982.40 |

Total shipments, 513,789.

## Recapitulation for 1909.

| | | |
|---|---|---|
| Freight paid | | $10,840.89 |
| Should be | | 6,892.40 |
| Overcharge | | 3,858.49 |
| Feet hauled by D. & M. | 3,523,856 | |
| Reshipped via D. & M. | 513,789 | |
| | 3,010,067 | |
| Less penalty on 3,010,067 feet not reshipped at 50c. per M. | | 1,505.03 |
| Net overcharge | | 2,353.46 |

## Log Shipments for Year 1910.

(Here follow 40 pages of items under the following headings and with the following totals:)

| Expense bill number. | Car No. | From— Amt. charged. | No. feet on car. | Miles hauled. | Rate per M. | Shld. be Frt. |
|---|---|---|---|---|---|---|
| Total 2,063.... | | $19,307.53 | 62,612,213 feet | | | 12,972.05 |
| | | 12,972.05 | | | | |
| Overcharge .... | | 6,335.48 | | | | |

## Lumber Shipments for Year 1910.

(Here follow two pages of items under the following headings and with the following totals:)

| Date. | B.-L. No. | Car number. | Feet shipped. | Destination. |
|---|---|---|---|---|

Total shipments, 1,464,029.

### 51 Recapitulation for 1910.

| | | |
|---|---|---|
| Freight paid | | 19,307.53 |
| Should be | | 12,972.05 |
| Overcharge | | 6,335.48 |
| Feet hauled by D. & M. | 6,261,213 | |
| Reshipped via D. & M. | 1,464,029 | |
| | 4,797,184 | |
| Less penalty on 4,797,184 feet not reshipped, at 50c. per M. | | 2,398.59 |
| Net overcharge | | 3,936.89 |

### Log Shipments for 1911.

(Here follow 30 pages of items under the following headings and with the following totals:)

| Expense bill number. | Car No. | From— Amt. charged. | No. feet on car. | Miles hauled. | Rate per M. | Shld. be Frt. |
|---|---|---|---|---|---|---|
| Total 1,582 cars.. | | 15,032.75 | 48,814.70 | | | |
| Shoul- be ....... | | 10,506.17 | | | | 10,506.17 |
| Overcharge ...... | | 4,526.58 | | | | |

### Lumber Shipments for 1911.

(Here follow 3 pages of items under the following headings and with the following totals:)

| Date. | B.-L. No. | Car number. | Feet shipped. | Destination. |
|---|---|---|---|---|

Total shipments, 2,639,532.

### Recapitulation for 1911.

| | | |
|---|---|---|
| Freight paid | | 15,232.75 |
| Should be | | 10,506.17 |
| | | 4,726.58 |
| Feet hauled by D. & M. | 4,881,470 | |
| Reshipped via D. & M. | 2,639,532 | |
| | 2,241,938 | |
| 52 Less penalty on 2,–41,938 feet not reshipped, at 50c. per M | | 1,120.97 |
| Net overcharge | | 3,605.61 |

## Log Shipments for Year 1912.

(Here follow 39 pages of items under the following headings and with the following totals:)

| Expense bill number. | Car No. | From— Amt. charged. | No. feet on car. | Miles hauled. | Rate per M. | Shld. be Frt. |
|---|---|---|---|---|---|---|
| Total 2,015 cars. . | | 18,983.86 | 6,164,690 feet | | | |
| Should be ....... | | 12,110.68 | | | | 12,110.68 |
| Overcharge ...... | | 6,873.18 | | | | |

## Lumber Shipments for 1912.

(Here follow 3 pages of items under the following headings and with the following totals:)

## Recapitulation for Year 1912.

| | | |
|---|---|---|
| Freight paid ................................. | | 18,983.86 |
| Should be .................................... | | 12,110.68 |
| Overcharge ........................... | | 6,873.18 |
| Feet hauled by D. & M. ................ | 6,164,690 | |
| Reshipped via D. & M. ................. | 3,866,869 | |
| | 2,297,821 | |
| Less penalty on 2,297,821 feet not reshipped, at 50c. per M ................................. | | 1,148.91 |
| Net overcharge ........................ | | 5,724.27 |

## Log Shipments for 1913.

(Here follow 41 pages of items under the following headings and with the following totals:)

53

| Expense bill number. | Car No. | From— Amt. charged. | No. feet on car. | Miles hauled. | Rate per M. | Shld. be Frt. |
|---|---|---|---|---|---|---|
| Total 2,132 cars. . | | 20,758.93 | 6,627,730 feet | | | 14,129.39 |
| Should be ...... | | 14,129.39 | | | | |
| Overcharge ...... | | 6,629.54 | | | | |

## Lumber Shipments for 1913.

(Here follow 6 pages of items under the following headings and with the following totals:)

| Date. | B.-L. No. | Car number. | Feet shipped. | Destination. |
|---|---|---|---|---|

Total shipments year 1914, 5,005,270 feet.

## Recapitulation for 1913.

| | | |
|---|---|---|
| Freight paid | | 20,758.93 |
| Should be | | 14,129.39 |
| Overcharge | | 6,629.54 |
| Feet hauled by D. & M. | 6,627,730 | |
| Reshipped via D. & M. | 5,005,270 | |
| | 1,622,460 | |
| Less penalty on 1,622,460 feet not reshipped, at 50c. per M | | 811.23 |
| Net overcharge | | 5,818.31 |

## Log Shipments, Year 1914.

(Here follow 33 pages of items under the following headings and with the following totals:)

| Expense bill number. | Car No. | From— Amt. charged. | No. feet on car. | Miles hauled. | Rate per M. | Shld. be Frt. |
|---|---|---|---|---|---|---|
| Total 1,609 cars | | 16,111.94 | 5,152,920 feet | | | 10,671.97 |
| Should be | | 10,671.97 | | | | |
| Overcharge | | 5,439.97 | | | | |

54

## Lumber Shipments for 1914.

(Here follow 4 pages of items under the following headings and with the following totals:)

| Date. | B.-L. No. | Car number. | Feet shipped. | Destination. |
|---|---|---|---|---|

Total for 1914, 3,190,890 feet.

### Recapitulation for 1914.

| | | |
|---|---|---|
| Freight paid | | 16,111.94 |
| Should be | | 10,671.97 |
| | | 5,439.97 |
| Feet hauled by D. & M. | 5,152,920 | |
| Reshipped via D. & M. | 3,190,890 | |
| | 1,962,030 | |
| Less penalty on 1,962,030 feet not reshipped, at 50c. per M | | 981.02 |
| Net overcharge | | 4,458.95 |

55 *Stipulation Annexed to Bill of Particulars.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

It is hereby stipulated as follows:

Plaintiff has filed a bill of particulars containing a detailed statement of the originating point, load, destination, and number of the cars containing the logs for which overcharges are claimed and specifying the details of plaintiff's claim in other particulars. This bill of particulars has been checked and verified by the representatives of both parties and has been found substantially correct in respect to its statements of fact and figures. For the purpose of saving the appointment of an Auditor or the submission of the details of plaintiff's claim to the court or jury, it is therefore hereby stipulated that all items, figures and statements of fact contained in said bill of particulars are correctly stated and shall be treated as true on the trial of this cause. This stipulation shall be construed as applying only to statements of fact, as such, and not to any legal conclusions or claims of liability deduced from such statements of fact, or claimed to result therefrom, and shall not be considered as waiving, conceding or in any wise affecting the question of the existence or non-existence of any legal liability growing out of the facts aforesaid. 56

Dated December 31, 1915.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, RICHARDSON LUMBER COMPANY, ISLAND MILL LUMBER COMPANY, Churchill Lumber Company, Michigan Veneer Company, Plaintiffs Respectively,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

### *Stipulation for Consolidation of Cases.*

(Filed December 31, 1915.)

For the purpose of facilitating the trial of these cases, it is hereby stipulated as follows:

A bill of particulars and a more specific bill of particulars have been furnished in the Fletcher Paper Company case, and bills of particulars similar to the more specific bill of particulars in the Fletcher Paper Company case have been furnished in all of the other cases. The more specific bill of particulars in the Fletcher Paper Company case has been checked by defendant, and certain amendments which have been agreed upon will be made by a stipulation to be hereafter filed. In the other four cases, the bills of particulars furnished will be checked over by defendant's accountants as rapidly as possible, and a list of the disputed or incorrect items (if any) will be furnished plaintiff's 57 attorneys in each case, as soon as possible, and an effort will be made to ascertain and agree upon the facts in regard to each. A stipulation covering the facts, so far as they can be agreed upon, will be filed in each case, leaving in dispute upon the trial only such items (if any) as cannot be disposed of by such stipulations. In order to satisfy plaintiffs that the work of checking up the bills of particulars is proceeding with reasonable speed, any representative of the plaintiffs may at any time make inquiries at the office of the defendant at Alpena and will be given information in regard to the rate of progress that is being made.

Defendant will make all possible efforts to complete the work of checking up the bills of particulars promptly so that the cases may be tried at the earliest date consistent with the completion of that work. If that work can be completed during the December term of the circuit court for the county of Bay, then the said cases shall be placed upon the docket for that term to be tried as soon as possible thereafter. If there is any unreasonable delay on the part of the defendant, plaintiffs may apply to the court by motion on the usual four days' notice, and the court, on the hearing of said motion, may set the cases for trial or may make such other order as may seem to him proper for the purpose of expediting the preparation and trial of the cases.

All of the cases shall be consolidated for trial as far as possible in the following manner:

All of the cases shall be submitted to the same jury (or to the court) at the same time. If the attorneys for all parties can agree that there are no questions for a jury, a jury will be waived by all parties. The parties will first introduce so much of their 58 evidence as may apply jointly to all of the cases, and will then introduce separately the evidence applying to each one of the cases separately, and the court or jury shall make a separate finding or verdict as to each with the same effect as if they had been separately tried. A separate judgment shall be entered in each case.

GILLETT & CLARK,
*Attorneys for Plaintiffs.*
JAMES McNAMARA,
HENRY, HENRY & HENRY,
*Attorneys for Defendant.*

Dated, December 31, 1915.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

*Stipulation as to Evidence and Trial.*

(Filed March 30, 1916.)

Defendant has requested a continuance to the May, 1916, term of the circuit court for the county of Bay, on account of the illness of Mr. Fred A. Baker. Plaintiff is opposed to the granting of such a continuance but hereby consents to the same on the following conditions and in return for the following stipulation made on behalf of the defendant:

1. Defendant agrees to ask for no further delay on account 59 of the illness of said Baker, but in case his illness continues, to proceed with the trial of the case in his absence at the May term of court.

2. When the docket is called for the May term of court which convenes May 15th, 1916, this case, (together with the other four cases consolidated with it), may be set for trial prior to June 1st, 1916. If both parties to this suit are willing to waive a jury trial, these consolidated cases shall be tried prior to the trial of jury cases if the court will consent thereto, otherwise the cases shall be placed on the jury calendar for trial as above stated.

3. Upon the trial of the five consolidated cases herein referred to as the refund cases, copy of the printed record in each of the following

cases may be offered in evidence (subject only to the objection or objections of either party as to competency, relevancy and materiality as substantive evidence), as proving itself and its contents with the same effect as if the said record and all of the contents thereof were duly authenticated and certified, viz:

(*a*) The printed record in the case of Detroit & Mackinac Railway Company vs. Michigan Railroad Commission, reported in 171 Michigan 335.

(*b*) Detroit & Mackinac Railway Company vs. Michigan Railroad Commission, reported in 235 U. S. 402.

4. The following formal facts are conceded without proof:

(*a*) That on July 25th, 1914, a writ of mandamus was granted by the Michigan supreme court according to and as appears from
60 the opinion in the case of Michigan Railroad Commission vs. Detroit & Mackinac Railway Company, 182 Mich. 234.

(*b*) That on December 14th, 1914, the supreme court of the United States affirmed the decree of the district court of the United States for the eastern district of Michigan, according to and as appears from the opinion reported in 235 U. S. 402, and that a decree was thereupon entered in accordance with said opinion.

(*c*) That on December 28th, 1914, the United States district court for the eastern district of Michigan, entered its decree dismissing the bill of complaint of the complainant, Detroit & Mackinac Railway Company in the last mentioned case.

(*d*) That on February 18th, 1915, the defendant, the Detroit & Mackinac Railway Company, issued and gave effect to its tariff "G. F. D. No. 775 A" all as set forth in plaintiff's declaration filed herein.

5. On or before April 15th, 1916, defendant's attorneys will give to plaintiff's attorneys a definite answer in writing relative to the acceptance on behalf of defendant of the communication made as of date March 15th, 1916, by plaintiff's attorneys. In case of failure so to do it is hereby agreed that such proposals in such communication are accepted on behalf of defendant.

In consideration of the above the attorneys for the plaintiff hereby consent to the continuance of this case until the May 1916, term of court without costs.

Dated, March 29th, 1916.

JAMES McNAMARA,
*Attorney for Defendant.*
GILLETT & CLARK,
*Attorneys for Plaintiff.*

61 HENRY & HENRY,
*Of Counsel for Defendant.*

*Certificate.*

STATE OF MICHIGAN,
*County of Bay, ss:*

**Pursuant to Circuit Court Rule No. 68, the appellants have attached to the bill of exceptions heretofore duly certified by me (but separate**

therefrom), copies or a fair abstract of each material pleading, document, order, judgment and other proceedings of record, all arranged chronologically as required by said rule; and at the request of the parties hereto I have this day duly settled and hereby certify the same as the transcript of the record to be returned with the writ of error by the clerk of the circuit court for the county of Bay to the clerk of the supreme court of the state of Michigan, which said transcript shall be the record for said supreme court for further action in connection with the appealing of said cause.

I further certify that a part of such transcript is the stipulations of the parties as to the application of the proceedings had and taken before the judge of the circuit court for the county of Bay, in the case of Fletcher Paper Company vs. The Detroit & Mackinac Railway Company, to the instant case and to the other so-called refund cases; judgments being rendered in all cases therein referred to November 27, 1916.

Dated April 10, 1917.

S. G. HOUGHTON,
*Circuit Judge.*

62 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

*Bill of Exceptions.*

The issue joined between the parties in this cause came on to be tried September 19, 1916, before the Honorable Lewis P. Coumans, Circuit Judge, sitting by consent of the parties, without a jury.

Edward S. Clark, of Gillett & Clark, appeared as attorney for plaintiff, Messrs. James McNamara, Charles R. Henry, James E. Duffy and Fred A. Baker, appeared as attorneys for defendant.

The case was tried in conjunction with the cases of Fletcher Paper Company vs. Detroit & Mackinac Company, Richardson Lumber Company vs. Detroit & Mackinac Railway Company, Churchill Lumber Company vs. Detroit & Mackinac Railway Company, and Michigan Veneer Company vs. Detroit & Mackinac Railway Company. For the convenience of court and counsel and by agreement of counsel, approved by the Court, certain evidence, motions and other proceedings applying equally to all of said cases were introduced and submitted only once, in the case of Fletcher Paper Company vs. Detroit & Mackinac Railway Company, and were then treated as if introduced and submitted in all of said five cases. For the above reasons, certain of said proceedings do not appear separately in the record of each of said cases.

63 Such proceedings are set forth herein, in a condensed form or by reference.

Before the taking of proofs, Mr. E. S. Clark, attorney for plaintiff, made a statement of plaintiff's claims and gave a history of the cause of action and the elements and factors going to make up and establish such action.

In connection with this opening statement he offered in evidence Exhibit 1 being the printed record in the Rate Case, and then proceeded to introduce from such record various petitions, orders, pleadings, exhibits and other things contained in such printed record, some of which were objected to on behalf of the defendant.

Other pleadings, documents, records, briefs and proceedings were also offered and received in evidence at this time.

This opening statement and offer of proofs and exhibits is contained in full in the case of the Fletcher Paper Company vs. The Detroit & Mackinac Railway Company, and by agreement between counsel, such statement and proceedings are to be treated in this case the same as though set forth in full at this time and place.

ROY RICHARDSON being duly sworn for plaintiff testified as follows:

Examined by Mr. Clark:

I live in Alpena and am secretary and treasurer of the Richardson Lumber Company.

(Articles of Association of Richardson Company offered in evidence as Exhibit 44.)

The stockholders at the present time are R. E. Gilchrist, Fred L. Richardson, Thos. McDade, William B. Taber and myself.

64 The nature of the Richardson Lumber Company's business during the years 1909 to 1914 was the manufacture of standing timber into rough lumber. The manufactured product that has been shipped out has been rough lumber.

Mr. Clark: We offer in evidence the bill of particulars of the Richardson Lumber Company together with the stipulation annexed as Exhibit 45.

I have some depositions in the Richardson Lumber Company case which I wish to offer as Exhibit 46. One of those depositions is that of Roy Richardson now here, and his presence in court makes his deposition inadmissible. It is merely a statement of a computation and if agreeable I will read it instead of asking the questions over again.

Mr. Henry: All right.

Mr. Clark: This was taken August 22, 1916. I appeared for plaintiff and Mr. Henry and Mr. McNamara for defendant. The signatures were waived.

Deposition of Roy Richardson, sworn for the plaintiff.

Examined by Mr. Clark:

Exhibit 1 is an interest statement by years which was made by Miss Beyer our bookkeeper and myself. Exhibit 2 is an interest statement by periods made in the same way. We got part of the material for these statements from the bill of particulars. Exhibits 1 and 2 are correct statements of what they purport to show.

(Exhibit- 1 and 2 offered in evidence.)

65 Cross-examination.

By Mr. Henry:

We computed interest at 5 per cent. We did not compound it. All the information pertaining to Exhibit 1 appears on the paper itself. For instance, the overcharge $19.56 is the first interest six years December 31, 1909 to January 1, 1916 at 5 per cent. We figured 5 per cent straight simple interest all the way through. In Exhibit 2 interest was computed at 5 per cent in the same way. Those figures are all taken from the bill of particulars filed in this case.

Flora Beyer sworn for the plaintiff.

Examined by Mr. Clark:

I helped making those statements exhibits 1 and 2. The work that I did was correctly done.

*Deposition of F. L. Richardson, Taken at Alpena, August* 22, 1916.

Fred L. Richardson sworn for the plaintiff.

Examined by Mr. Clark:

I live in Alpena and am 51 years of age. I am President of the Richardson Lumber Company. I had some connection with a tender of the commission rate made to the Detroit & Mackinac Railway Company before the payment of any of the rates for which refund is sought in this litigation. I cannot tell you the day and date when the tender was made. I cannot tell you to whom tender was made, but it was to the clerk in charge at the depot. I remember taking the exact amount of money that would pay it at the lower rate, and paying the higher rate *is* a signed check, because I didn't expect them to take it. I either tendered it myself or the person with me tendered it, but I was there and helped make the tender. I remember meeting Mr. Reeves after I had made the tender and told him that I had made this tender at the lower rate which he said he understood, and I said "Harry, is it necessary for me to keep on making this kind of a tender? Are you ever going to take it?" And he said, "I am going to carry out the instructions 66 of the railroad officials as it reached me. They have instructed us not to take it, and if you keep on tendering it, I will keep on refusing it until they tell me differently, and when they do, you will know it." We were not getting material in at the time the Commission put the ruling in effect or made the order, but it was at the payment of the first material that came in after that. I tendered the commission rate in legal money of the United States. That was refused.

Cross-examination.

By Mr. Henry:

I could not tell at what time I made the tender with respect to the three orders. The order in the latter part of the year 1909, two in October and one on the 3d of November and a so-called supplemental order. My recollection is that it was some time after the rate was ordered by the Commission—some months even after the thing was ordered by the Commission. The new rate was ordered by the Commission before we had occasion to use any log rate—before we had any logs come in; but with reference to a certain date in November or December, I could not say.

I made the tender at the time the rate was due on the first shipment of logs. It was all that was due according to the rate 67 fixed by the Commission. The tender was made at the D. & M. freight office to the person in charge there. I could not tell you the name nor the amount I tendered. I met Mr. Reeves on the street. I told him what I had done and said, "Well, I suppose you will keep on refusing them, and will it be necessary for me to go there and tender it every day? Are you going to keep on refusing it?" And he says, "I am going to refuse that until the railroad company—I am not going to accept any other rate until the railroad officials tell me differently and then you will know it."

Q. Have you any means of furnishing us with a statement showing after the 3d day of November, 1909, down to the 18th of February, 1915, whether you received from the Fletcher Paper Company any logs that were shipped into Alpena by rail, and if so when you received them and the number of feet?

A. Well, I couldn't give it. Like many other details in our business it is not in my mind. The matter of the exchange of logs is on our bo-ks, but just what it shows or how it shows I could not tell you.

Q. We would like to have you prepare or have your office force prepare a statement showing the dates and quantity of hemlock logs after November 3, 1909, up to the 18th of February, 1915, which you received from the Fletcher Paper Company in any way, shape or manner?

Mr. Clark: This is to be used in the case of the Fletcher Paper Company against the D. & M.?

Mr. Henry: It might be used in the Richardson Lumber Company case possibly.

Mr. Clark: I have no objection to your giving that statement.

You are at perfect liberty if you consider it a burden—I
68 suppose you might require these gentlemen to make you their witness and pay you a witness fee.

Witness: You understand I have no knowledge of the details of the bookkeeping end of it and I would much prefer to give it to you through our regular help here.

Mr. Henry: Of course, that will be entirely satisfactory.

Mr. McNamara: So that you make it up from your books. We do not want to put you to any unnecessary trouble.

Mr. Henry: Take it and consider it and at any time let Mr. McNamara or myself know what you are willing to do. That will be sufficient.

Witness: I will be glad to do that, Mr. Henry.

Mr. Henry: Of course, it will have to be made up from your books.

(It is conceded that the Mr. Reeves referred to was the local freight and passenger agent of the Detroit & Mackinac Railway Company at Alpena.)

69 The following are the exhibits and schedules annexed to the foregoing depositions and referred to therein.

### EXHIBIT 1 (RR.).

Richardson Lumber Company.

*Interest Statement by Years.*

| | Over-charge. | Int. to Jan. 1, '16. |
|---|---|---|
| 1909. | | |
| After Nov. 26 (last date Dec. 31, 48,560 feet. | | |
| Overcharge 43.94 | | |
| Less penalty 24.28 | 19.56 | |
| Interest 6 yrs., Dec. 31, 1909, to Jan. 1, 1916, at 5 per cent | | 5.87 |
| 1910. | | |
| See bill of particulars (last date Dec. 31) | 3,936.89 | |
| Interest, 5 years, Dec. 31, 1910, to Jan. 1, 1916, at 5 per cent | | 984.22 |
| 1911. | | |
| See B. of P. (last date Sept. 25) | 3,605.61 | |
| Interest, 4 years 3 mos., 5 days to Jan. 1, 1916, at 5 per cent | | 768.67 |
| 1912. | | |
| See B. of P. (last date Oct. 5) | 5,724.27 | |
| Interest, 3 years, 2 mos., 26 days to Jan. 1, 1916, at 5 per cent | | 927.00 |

| | | |
|---|---|---|
| 1913. | | |
| See B. of P. (last date Nov. 10) | 5,818.31 | |
| Interest, 2 years, 1 mo., 20 days to Jan. 1, 1916, at 5 per cent | | 622.23 |
| 1914. | | |
| See B. of P. (last date Sept. 21) | 4,458.95 | |
| Interest, 1 year, 3 mos., 9 days to Jan. 1, 1916, at 5 per cent | | 284.24 |
| | 23,563.59 | 3,592.23 |

Interest at 5 per cent will also be computed on principal sum from January 1st, 1916, to date of judgment.

## 70 EXHIBIT 2 (RR.).

### Richardson Lumber Company.

### *Interest Statement—By Periods.*

The periods used are as follows:
First Period—Nov. 26, 1909, to Feb. 11, 1911.
Second Period—Feb. 12, 1911, to July 22, 1912.
Third Period—July 23, 1912, to March 22, 1913.
Fourth Period—March 23, 1913, to July 25, 1914.
Fifth Period—July 26, 1914, to Dec. 14, 1914.

### Details.

| | | Over-charge. | | Int. to Jan. 1, '16. |
|---|---|---|---|---|
| First Period— | | | | |
| 1909 | 19.56 | | 5.87 | |
| 1910 | 3,936.89 | | 984.22 | |
| 1911 (to Feb. 11) | 297.59 | 4,254.04 | 63.44 | 1,053.53 |
| Second Period— | | | | |
| 1911 (from Feb. 12) | 3,308.02 | | 705.23 | |
| 1912 (to July 22) | 3,506.42 | | 567.84 | |
| | | 6,814.44 | | 1,273.07 |
| Third Period— | | | | |
| 1912 (from July 23) | 2,217.85 | | 359.16 | |
| 1913 (to Mar. 22) | 839.98 | | 89.93 | |
| | | 3,057.83 | | 448.99 |
| Fourth Period— | | | | |
| 1913 (fr-m Mar. 23) | 4,978.33 | | 532.40 | |
| 1914 (to July 25) | 3,398.87 | | 216.67 | |
| | | 8,377.20 | | 749.07 |

| | | | |
|---|---|---|---|
| Fifth Period— | | | |
| 1914 (from Jul. 26)... | 1,060.08 | | 67.57 |
| | | 1,060.08 | |
| Total .................. | | 23,563.59 | 3,592.23 |

I hereby certify that the amount of hemlock logs delivered to the Fletcher Paper Co. during the period from Nov. 3rd, 1909, to Feb. 18th 1915, were as follows:

During the winter of 1911-12—804,480 ft. R. R. logs.
During the fall of 1912—661,815 ft. R. R. logs.
During January, 1913—65,610 ft. R. R. logs.
71 During the year 1914—10,308 ft. river logs.

I also certify that the amount of hemlock logs received from the Fletcher Paper Co. during the same period was as follows:

| | | |
|---|---|---|
| During the year 1912............... | 1,271,495 | ft. of river logs. |
| During the year 1913............... | 104,465 | ft. of river logs. |
| During the year 1914............... | 5,648 | ft. of river logs. |
| Total...................... | 1,381,608 | ft. |

RICHARDSON LUMBER CO.,
By F. L. RICHARDSON, *Pres.*

Dated at Alpena, Mich., Aug. 31st, 1916.

After the reading of the foregoing depositions, the following occurred:

Mr. Clark: Attached to the deposition is a statement made by Mr. Richardson, of which Mr. Henry, I think, now has a copy. I do not know what counsels' idea in getting that statement was or what the application of it was, and therefore I cannot say any more than to show it to your Honor. It merely shows that the Richardson Lumber Company delivered to the Fletcher Paper Company so many feet of logs during certain seasons and received from them so many feet of logs during other season.

Plaintiff here rested its case. The motion to dismiss and other subsequent proceedings in the Fletcher Paper Company case were understood to apply also to this case.

Mr. James McNamara, one of the attorneys for the defendant, made an opening statement in behalf of the defendant which is set forth in full in the printed — of the Fletcher Paper Com-
72 pany vs. The Detroit & Mackinac Railway Company, and by stipulation between the attorneys, such statement shall be treated the same as though it was set forth in full at this time and place.

At the conclusion of Mr. McNamara's opening statement, he made a motion to dismiss, based upon the statements made by him and for the reasons therein set forth.

Thereafter Mr. Fred A. Baker, one of the attorneys for defendant, stated additional reasons for the dismissal of the case and then made an offer to submit additional proofs, setting forth in detail the proofs desired on behalf of defendant.

At the conclusion of the motion and offer, the court took the same under advisement, and decided both the motion and the offer in the opinion filed in this case before judgment on the 13th day of November, 1916, hereinafter set forth.

State of Michigan:

In the Circuit Court for the County of Bay.

Richardson Lumber Company, Plaintiff,

vs.

Detroit & Mackinac Railway Co., Defendant.

### *Motion to Elect.*

(This motion will apply to all of the cases tried in connection with the cause herein entitled.)

(Filed Sept. 27, 1916.)

Now comes the Defendant in the above entitled cause, at the conclusion of the evidence and argument, so far as such evidence 73 has been submitted and argued, and now here moves the court that the plaintiffs by their attorneys elect and expressly determine whether they claim a recovery in each of said cases based upon the Statutes of the State of Michigan, or whether they elect and determine to so recover based upon the so-called Common Law, or whether they elect and determine to recover on a combination of the Statutes of the State of Michigan and the Common Law.

This Defendant further moves the Court to require the Plaintiffs by their attorneys, or otherwise, to elect and determine whether they claim the right to insist upon the complaints referred to in the declaration of the several plaintiffs and the orders thereafter made by the Railroad Commission of the State of Michigan, were made in pursuance of Section 10, sub-paragraph (*g*) and Section 22 Act 300 of the Public Acts of 1909.

This Defendant further moves the Court to require the Plaintiffs or their attorneys to elect and determine whether any proceedings had and taken in the causes above entitled were made pursuant to Section 10, Subsection (*g*) Act 300 of the Public Acts of 1909.

Defendant now here moves the Court to require the Plaintiffs themselves or their attorneys, to indicate upon the record in this cause forthwith and before the decision made by this court, their position relative to the requirements of this motion.

Dated this 26th day of September, 1916.

JAS. McNAMARA,
*Attorney for Defendant.*
FRED A. BAKER,
HENRY & HENRY,
WEADOCK & DUFFY,
*Of Counsel.*

74 *Stipulation for Election of Remedy.*

(Signed Sept. 29, 1916; Filed Sept. 30, 1916.)

(Cause Entitled.)

Whereas the defendant in the cases above entitled has made a motion and filed the same in said cause to the effect that the plaintiffs or their attorneys elect under what law they seek a recovery in the said cases.

Now, therefore, it is stipulated and agreed by and between the parties to the several suits, by their attorneys respectively, that the said motion may be filed in the Court and cause above entitled, and the parties hereto by their attorneys submit to the Court their argument as to the law and facts involved in such motion.

It being understood and agreed that the defendant shall submit its brief in respect to such motion and thereafter plaintiffs' attorneys may submit their briefs in opposition thereto.

The purpose of this stipulation is to obviate the necessity of an argument on such motion, other than by the briefs hereinbefore indicated.

As hereinbefore stated, this stipulation shall apply to all cases the calendar numbers of which are listed at the head of this document.

Dated this 29th day of September, 1916.

JAS. McNAMARA,
*Attorney for Defendant.*
HENRY & HENRY,
WEADOCK & DUFFY,
*Of Counsel.*

GILLETT & CLARK,
*Attorneys for Plaintiffs.*

75 *Opinion of Hon. L. P. Coumans, Circuit Judge.*

(Filed Nov. 13, 1916.)

This case is an outgrowth of litigation reported as:
Det. & Mack. Ry. Co. vs. Mich. R. R. Com. 171 Mich. 335.
Det. & Mack. Ry. Co. vs. Mich. R. R. Com. 203 Fed. 864.

Det. & Mack. Ry. Co. vs. Mich. R. R. Com. 235 U. S. 402.
Mich. Ry. Com. vs. Det. & Mack. Ry. Co. 182 Mich., 234.
Mich. Ry. Com. vs. Det. & Mack. Ry. Co. 184 Mich., 242.
Mich. Ry. Com. vs. Det. & Mack. Ry. Co. 185 Mich., 649.

The litigation resulted from certain orders of the Michigan Railroad Commission which were dated October 19, 1909, October 22, 1909, and November 3rd, 1909, and involved switching charges and freight rates to Alpena. The order relating to switching charges was served on November 6th, 1909.

Defendant's bill of complaint attacking the validity of these orders was filed in the Circuit Court for the County of Wayne in Chancery on November 20, 1909.

Voluminous proofs were taken and the case referred back to the Railroad Commission as required by law. The Commission on November 15, 1910, reaffirmed its former orders and so reported to the Court.

Judge Murfin filed his opinion on January 21, 1911, and February 11, 1911, entered a decree dismissing the bill of complaint.

This decree was affirmed by the Supreme Court of Michigan on July 22, 1913. (See 171 Mich., 335.)

The decree was entered in the Michigan Supreme Court on July 29, 1912.

An application for the allowance of a writ of error from the Supreme Court of the United States was denied both by the Supreme Court of Michigan and also by one of the justices of the Supreme Court of the United States. The railroad company there-
76 upon on August 17, 1912, filed an original bill in the District Court of the United States for the Eastern District of Michigan, Southern Division in Equity, and asked for a preliminary injunction.

This application was heard by three federal judges and the injunction was denied upon grounds which were sufficient to justify the dismissal of the bill. The opinion of the three federal judges is reported in 203 Fed. Rep. 864, and was dated March 22, 1913.

The railroad company then appealed to the Supreme Court of the United States which affirmed the decision of the District Court by an opinion filed December 14, 1914, and reported in 235 U. S. 402.

On December 28, 1914, the District Court dismissed the bill of complaint.

While the case was pending in the Supreme Court of the United States an application was made by the Michigan Railroad Commission to the Supreme Court of Michigan for a writ of mandamus to compel the railroad company to put the commission rates into effect. The writ was granted on July 25, 1914. (See 182 Mich., 234.)

On February 4, 1915, the Supreme Court of Michigan in an opinion reported in 184 Mich. 242, held that the railroad company was in contempt for failing to comply with the writ of mandamus. A further controversy arising out of the writ and contempt proceedings was later before the Supreme Court and was decided by an opinion reported in 185 Mich., 649.

The freight tariff which conformed to the orders of the Michigan Railroad Commission was finally filed by defendant on February 18, 1915. Until this date the defendant continued to exact from Alpena shippers the rates which had been condemned by the
77 Michigan Railroad Commission, and refused to put into
actual effect the orders of the commission. This action is brought to recover the difference between the rates so paid and the rates fixed by the orders of the Railroad Commission.

A demurrer to the declaration was filed and argued before my predecessor, Judge Collins, and was overruled by him. His opinion was filed with the clerk and will form part of the record in the case.

Plaintiff filed a bill of particulars containing several hundred pages and giving complete details in regard to all over-payments claimed. This bill of particulars was checked and verified by defendant's accountants before the case was tried and all errors were noted and corrected by stipulation. This stipulation was supplemented by certain explanatory testimony on behalf of plaintiff, none of which has been controverted by defendant. The court was not therefore required to decide any complicated question of fact and a jury was wa-veid by both parties. After the completion of plaintiff's proofs defendant made a motion to dismiss in the nature of a demurrer to plaintiff's evidence. At the same time defendant made an offer of proof to be submitted if the motion to dismiss should be overruled.

This offer was carefully and elaborately framed, and appears in the record. The proof offered was objected to by plaintiff as incompetent and immaterial. My ruling on this offer and objection necessarily depended upon my decision in regard to the motion to dismiss and the decision of both questions was therefore reserved and is covered by this opinion.

In reaching my conclusions of law I have formed my own opinions independently of Judge Collins' decision on the demurrer.

## 78 *Conclusions of Law.*

1. The right to recover excessive or illegal freight rates by an action of assumpsit existed at common law and has not been taken away by statute.

2. The statute (Act 300 of 1909) gives additional rights and remedies, but creates no new form of action.

3. The new provisions for the protection of shippers are principally found in Sections 10 and 22 of the statute. These sections apply to different circumstances. Proceedings under one or the other of these sections may be selected to fit the circumstances. The result in each case is an order of the commission and I find nothing in the statute to indicate that an order made under Section 22 is any less effective than an order made under Section 10. I, therefore, hold that plaintiff was not required to take any proceedings under Section 10 before commencing its action.

4. If the orders of the Railroad Commission stood alone, it might be open to the defendant to question their validity in this case. It

is not necessary to decide this question, as the confirmation of the orders by the state and Federal courts in the decisions cited above makes them conclusive in this case. The statute provides that the orders of the commission shall be in force until set aside by an action brought under Section 26 of the act, or rescinded by the commission. Defendant has exhausted its remedies under Section 26, and these orders must, therefore, be given effect until further action by the commission itself. I, therefore, sustain the objection to the proofs offered by defendant. Defendant may have the benefit of an
79 exception to this ruling and by its offer and exception will be protected on appeal.

5. The commission rates became the law of the state twenty days after service of the commission's orders. The order reducing the switching charges to Fletcher's Dam therefore took effect on November 24, 1909, and the log rate orders took effect November 26, 1909. Defendant had the right to attack these orders in the courts, but was charged with knowledge that if its attack did not succeed, the orders would be considered as effective from the above dates. These dates should, therefore, be used as the dates from which to compute plaintiff's damages.

6. This conclusions is not changed by the fact of defendant's delay in posting and filing its new tariff or by the pendency of litigation during this period of delay.

7. Nor by any stipulation signed by the attorney general and relied upon by defendant.

For the above reasons defendant's motion to dismiss is denied.

8. In order to enjoy the fifty cent differential, plaintiff is not required to prove the reshipment by rail of the manufactured product from exactly the same logs which were shipped in by rail. The amount and nature of the merchandise reshipped are the important features. In the case of a saw mill, a thousand feet of lumber should be considered as a "manufactured product," of a thousand feet of logs. In the case of other industries the words "manufactured product" should be construed in their ordinary sense, as meaning such merchandise in nature and quantity as under ordinary circumstances will reach the market as a result of the manufactur-
80 ing processes through which the logs go. Saw dust, slabs, and other waste and incidental by-products may be properly ignored.

9. The question of double damages would more properly come before me on the entry of judgment. Both parties joined in submitting this question on the hearing and I understand that both will welcome a decision of that question at this time so as to avoid any further hearing on the entry of judgment. I have decided to confine plaintiff to single damages, but plaintiff may have the same right to review my ruling on this question as if a special motion to double the damages were made and overruled after the filing of this opinion. If plaintiff considers that its rights on appeal necessitate that course plaintiff's counsel may file such a motion and enter an order overruling the same without further hearing or argument. The computations already in the record will give the appellate court all the ma-

terial necessary to determine the amount which should be added to the judgment if they should decide that damages should be doubled either in whole or in part.

## *Findings of Fact.*

1. The bills of particulars and other schedules and computations offered in evidence by plaintiff are correct, and are used in determining the amount due plaintiff. They are too voluminous to incorporate in this finding but may be considered as if incorporated herein.

2. Plaintiff during the period for which damages are allowed reshipped over the line of the defendant railroad company manufac-
tured product which exceeded the amount manufactured from
81 the logs shipped in by rail, and covered by the particulars of
plaintiff's claim. For the purposes of this finding I adopt the schedules annexed to the deposition of Henry E. Fletcher with the same force as if they were set out at length in this finding.

3. Plaintiff's single damages with interest to November 13, 1916, at five per cent, amount to $25,738.83.

## *Instructions for Entry of Judgment.*

Section 14, of chapter 18, of the judicature act, contemplates that judgment shall be entered immediately upon the filing of findings of fact and conclusions of law. To give the attorneys on both sides an opportunity to file such further requests, exceptions or motions as they may desire in order to complete the record, the clerk is instructed to defer the entry of judgment until November 20, 1916, and to thereupon enter judgment for plaintiff for the amount above named together with interest at five per cent from November 13, 1916, to the date of the judgment entry.

Plaintiff will recover costs.

L. P. COUMANS,
*Circuit Judge.*

## 82 *Opinion of Circuit Judge.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

This cause is precisely similar to the case of Fletcher Paper Company vs. Detroit & Mackinac Railway Company, and by stipulation of the parties was consolidated for trial. I, therefore, adopt my general statement of facts and the conclusions of law as found in my opinion filed in the Fletcher Paper Company case.

*Findings of Facts.*

1. The bills of particulars and other schedules and computations offered in evidence by plaintiff are correct, and are used in determining the amount due plaintiff. They are too voluminous to incorporate in this finding but may be considered as if incorporated herein.

2. The amount of manufactured product reshipped by plaintiff over the line of the defendant company is as shown by its bills of particulars.

3. Plaintiff's single damages with interest to November 13, 1916, at five per cent, amount to $27,184.97.

*Instructions for Entry of Judgment.*

83 Section 14 of Chapter 18 of the Judicature Act contemplates that judgment shall be entered immediately upon the filing of findings of fact and conclusions of law. To give the attorneys on both sides an opportunity to file such further requests, exceptions or motion as they may desire in order to complete the record, the clerk is instructed to defer the entry of judgment until November 20, 1916 and to thereupon enter judgment for plaintiff for the amount above named together with interest at five per cent from November 13, 1916, to the date of the judgment entry.

Plaintiff will recover costs.

L. P. COUMANS,
*Circuit Judge.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Now comes the above named plaintiff and moves the court to enter judgment for double the amount of the damages sustained by plaintiff as found by the court in his opinion and findings heretofore filed or in default thereof to double a part of the said damages. This motion is made in the alternative as follows, viz:

(1) To double plaintiff's entire damages aggregating $28,184.97.

84 (2) As an alternative to the above to double so much of plaintiff's damages as have accrued since July 22, 1912, viz: $14,303.95.

(3) As an alternative to the above to double so much of plaintiff's damages as have accrued since March 22, 1913, viz: $10,664.17.

(4) As an alternative to the above to double so much of plain-

tiff's damages as consists of the interest accrued on the sums paid by plaintiff in excess of the lawful charges, viz: the sum of $4,621.38.

(5) As an alternative to the above to double so much of plaintiff's damages as have accrued since July 25, 1914, viz: $1,173.74.

This motion is based upon the records and files in this cause and upon the opinion, conclusions of law, and findings of fact heretofore filed herein.

GILLETT & CLARK,
*Attorneys for Plaintiff.*

*Exceptions by Defendant to Opinion and Findings of Judge Coumans Filed Nov.* 13, 1916.

(Filed November 16, 1916.)

Now comes the said defendant, by James McNamara and Henry & Henry, its attorneys, within four days after the filing by the circuit judge of his findings of fact and law in this cause, and alleges exceptions to the mattres of law embodied in such findings as follows:

1. The defendant excepts to the ruling of the court that common
law actions of assumpsit for the recovery of excessive or illegal
85 freight rates have not been taken away by statute.

2. The defendant excepts to the ruling of the court that the statute, Act 300 of the Public Acts of 1909, gives additional rights and remedies, but creates no new form of action.

3. The defendant excepts to the ruling of the court sustaining the objection to the proofs offered by the defendant.

4. The defendant excepts to the ruling of the court that the commission rates became the law of the state twenty days after the service of the commission's orders, viz: Nov. 24, 1909, and Nov. 26, 1909.

5. The defendant excepts to the ruling of the court that the defendant's delay in posting and filing its new tariff or by the pending of the litigation, or the stipulation of the attorney general, did not change the conclusion that the orders of the commission were the law of the state twenty days from the service of said orders.

6. The defendant excepts to the ruling of the court denying the defendant's motion to dismiss the plaintiff's action.

7. The defendant excepts to the ruling of the court that the plaintiff can recover the differential (rebate) of fifty cents per thousand feet as an excessive charge and without proving the reshipment by rail of the manufactured product from exactly the same logs which were shipped in by rail.

8. The defendant excepts to the ruling of the court that
86 the orders of the commission are conclusive proof that the
rates collected by the defendant were excessive, and of the
amount of the excess.

9. The defendant excepts to the ruling of the court that the facts found by it supports its conclusions of law.

10. The defendant excepts to the ruling of the court that plaintiff is entitled to judgment.

JAMES McNAMARA,
HENRY & HENRY,
*Attorneys for Defendant.*

## *Requests for Findings of Fact and Conclusions of Law.*

After the opinion had been filed by Judge Coumans and before judgment, the attorneys for the respective parties made and submitted to the court the following requests for findings of fact and conclusions of law.

## *Defendant's Requests for Findings of Fact and Conclusions of Law.*

(Filed November 27, 1916.)

To Hon. L. P. Coumans, Circuit Judge, and the Circuit Court for the County of Bay:

Now comes the defendant by its attorneys and counsel and respectfully requests said judge and the court to pass specially on all of the points, requests and questions of law and fact hereinafter particularly set forth in the five several causes and actions pending before this court as hereinafter entitled.

87 The requests and points of law and fact herein referred to are presented to this court pursuant to circuit court Rule 45 and the statute in such case made and provided.

Dated, this 21st day of November, 1916.

JAMES McNAMARA,
*Attorney for Defendant.*

FRED A. BAKER,
HENRY & HENRY,
WEADOCK & DUFFY,
*Of Counsel for Defendant.*

88 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

Cal. No. 10211.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

Cal. No. 10216.

RICHARDSON LUMBER CO., Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

Cal. No. 10220.

CHURCHILL LUMBER CO., Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

Cal. No. 10221.

MICHIGAN VENEER CO., Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

Cal. No. 10222.

ISLAND MILL LUMBER CO., Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

By stipulation made and entered into by and between the parties through their attorneys respectively, the foregoing five cases were tried and heard together by Honorable L. P. Coumans, circuit judge of Bay county, and the foregoing requests apply 89 to each of said cases so far as the same shall be consistent and applicable thereto.

Pursuant to sections 14 and 15 of chapter 18 of the Judicature Act, and pursuant to circuit court Rule 45, and pursuant to all other laws and statutes pertaining to the subject matter of such requests, the defendant, by its attorneys, having received from said circuit judge his opinion, findings of fact, and conclusions of law, now here comes into this court and respectfully requests the court and the judge thereof to modify, change and add to such opinion, findings of facts and conclusions of law as follows:

First.

That the petitions and complaints heretofore made by the plaintiffs to the Michigan Railroad Commission did not comply with the provisions of Act No. 300 of the Public Acts of 1909, and did not authorize and empower such Railroad Commission to issue and make the orders declared upon by the plaintiffs respectively in the several causes hereinbefore entitled.

Second.

That the orders of the Michigan Railroad Commission of date October 19th, October 22nd and November 3rd, 1909, are unauthorized, illegal and void, because no lawful petitions have heretofore been made by the plaintiffs or either of them, thereby making such orders forceful or effective.

### Third.

That whatever force or effect such orders may have provided
90 as a condition precedent to the making of such orders effective,
the law required that the same should be filed with the Michigan Railroad Commission, and posted and published in the various stations of the defendant; these provisions and requirements were not complied with, therefore the plaintiffs cannot have judgments in these suits.

### Fourth.

That by virtue of the order made by Judge Mandell, in the circuit court for the county of Wayne, (referred to in the evidence submitted in this cause), and by virtue of the stipulation made by and on the part of the plaintiffs, by Attorney General John E. Bird, and by and on behalf of the defendant by James McNamara, defendant's attorney, such orders so declared upon did not become forceful and effective until on or about the 18th day of February, 1915, at the conclusions of the litigation before then continuously pending before the Railroad Commission of Michigan, the circuit court for the county of Wayne, the supreme court of the state of Michigan, the district court of the United States for the eastern district of Michigan, southern division, the United States Appellate court, and the supreme court of the United States.

### Fifth.

That at the conclusion of the proofs submitted to this court by and on behalf of the plaintiffs, the motion made on behalf of the defendant to dismiss said several causes and enter therein judgment in favor of the defendant of no cause of action will be made and granted by this court.

### Sixth.

That the plaintiffs could not institute in this court the
91 proceedings heretofore had and taken therein without complying with sub-section (*f*) of section 10 of said Act 300.

### Seventh.

That as a condition precedent to the commencement of the several causes above entitled, the plaintiffs were required to make complaint to the Railroad Commission for any and all excessive or illegal, irregular or exorbitant, unreasonable or unjustly discriminatory freight rates before then exacted from the plaintiffs by the defendant for the recovery of which these several suits were instituted. This plaintiffs did not do and judgment of no cause of action will be made and entered.

### Eighth.

That in the event this court should determine that the plaintiffs were entitled to recover the claims made by them or any part of such claims, in that event the motion made by and on the part of the defendant to submit proofs relative to the issues framed and made by and between the parties hereto will be granted.

### Ninth.

That the plaintiffs cannot recover in their several suits because before the commencement thereof the Railroad Commission did not determine the amount, if any, of the asserted excessive or illegal, irregular or exorbitant freight rates exacted by defendant, and because said defendant was never permitted to refund or pay to the plaintiffs any amount of excessive or illegal freight rates asserted to have been exacted from the plaintiffs by the defendant.

92

### Tenth.

Plaintiffs cannot recover in their respective suits because they did not comply with any of the mandatory or other provisions of said section 10, hereinbefore referred to.

### Eleventh.

The court is respectfully requested to find as a conclusion of law that the plaintiffs cannot recover in their suits because the tariff of rates and the switching charges into the city of Alpena declared upon were never scheduled, and were never filed with the commission, nor were they ever posted and published pursuant to the statute in such case made and provided.

### Twelfth.

This court is respectfully requested to require the plaintiffs to elect and determine whether they demand recovery by virtue of Act 300 of the Public Acts of 1909, or whether they claim the right to recover independent of such act, and by virtue of the common law.

### Thirteenth.

This court is respectfully requested to require the plaintiffs to elect and determine whether they claim the right to recover by virtue of the invocation of both the common law of the state of Michigan, and the statute law, hereinbefore referred to.

### Fourteenth.

The court is respectfully requested to construe paragraph 3, of its conclusions of law, thereby indicating what circumstances
93 Would authorize proceedings pursuant to Section 10, of said Act 300, and what circumstances would authorize a recovery by virtue of the provisions of Section 22. In view of the conclusions of law indicated by this court in said third paragraph thereof this court is respectfully requested to find and determine that no suit could be instituted by the plaintiffs regardless of the circumstances evidenced in the instant case, without invoking the provisions of said Section 10.

### Fifteenth.

This court is respectfully requested to permit the defendant in each of the said several causes to submit proofs respecting the subject matter alleged in the plaintiffs' declaration covering the entire time for which recovery is demanded, providing this court shall determine that the plaintiffs are entitled to recover in whole or in part for the asserted excessive or illegal, irregular or exorbitant, unreasonable or unjustly discriminatory freight rates exacted by the defendant.

### Sixteenth.

The court is respectfully requested to permit the defendant to give evidence relative to the issues framed in such suits, in any event, from and after the 15th day of August, 1910, that being the date when the last evidence was taken respecting said three several orders hereinbefore referred to.

### Seventeenth.

The court is respectfully requested to find that the order made by the Michigan Railroad Commission relative to a switching charge to and from the city of Alpena and the Fletcher Dam, should
94 be a commodity tariff rate, and not a switching rate by reason of the location of said Fletcher's Dam, with respect to the location or the station limits of said defendant at the City of Alpena.

### Eighteenth.

The court is respectfully requested to deny any right of recovery on behalf of the plaintiffs, because Honorable James O. Murfin, Circuit Judge, in and for the County of Wayne, peremptorily declined to hear the defendant on its motion for a rehearing as to the legality of the three several orders hereinbefore referred to, and all other proceedings had and taken by and before said Court and the judge thereof.

### Nineteenth.

This court is respectfully requested to find and determine that in event the plaintiffs invoke the common law remedy, the same would operate as a repeal of the Statute to the extent that the same was so invoked.

### Twentieth.

The court is respectfully requested to expressly determine and find that the proceedings had and taken by way of demurrer in these suits did not to any extent or in any particular adjudicate any of the issues involved in these suits.

### Twenty-first.

The court is respectfully requested to find and determine that in order to entitle plaintiffs to recover in these proceedings any rebate of 50 cents per thousand feet of the manufactured product shipped out, that such a rebate can only be accorded to the plaintiffs
95 by the outshipment of products manufactured from the same
forest products shipped to the plaintiffs.

### Twenty-second.

The court is respectfully requested to find that any parts of such forest products shipped in to them which were not actually shipped out, such as the hearts of logs from which veneer was taken, and other parts of such forest products not shipped out, should be credited to the defendant with respect to any provision in the tariff of rates made by said Railroad Commission, providing for a rebate on out-shipments; and because nothing in plaintiffs' bills of particulars specified such reservations, plaintiff- cannot generalize *it* claim and claim rebate therefor.

### Twenty-third.

The court is respectfully requested to find and determine that no judgment can be entered in favor of the plaintiffs by reason of the fact that the proceedings had and taken on the issues made herein before this court is overcome by the great weight and preponderance of evidence in favor of the defendant.

### Twenty-fourth.

This court is respectfully requested to find and determine that in no event can the plaintiffs recover for any asserted excessive or illegal, irregular or exorbitant rates from a date prior to six months before the commencement of such action pursuant to Sub-section (*g*) of said Section 10.

### Twenty-fifth.

This court is respectfully requested to find that the three said several orders declared upon by the plaintiffs expressly pro-
96 vide for the posting and publishing of any rates made by said Railroad Commission, and further that said orders declared upon were not posted and published until on or about the 18th day of February, 1915, and that the provisions of the statute respecting such posting and publishing are mandatory and by reason thereof are requirements and conditions precedent to any right of recovery on behalf of the plaintiff-.

### Twenty-sixth.

The court is respectfully requested to find that no amount can be recovered on behalf of the plaintiffs by reason of Sections 16 and 18 of said Act 300, and that said defendant by exacting amounts from the plaintiffs other or different than the posted and published tariff of rates would be an express violation of the provisions of such statutes.

### Twenty-seventh.

The court is respectfully requested to determine and find that the defendant by exacting any other or different amounts than provided in the schedule of tariff rates posted and published as aforesaid, would work an unlawful injustice to the public generally, and thereby destroy the uniformity of rates provided for in such statute.

### Twenty-eight.

The court is respectfully requested to find and determine that Section 10 of said Act is designed to provide reparation to the shipper and relates exclusively to illegal and excessive, irregular or exorbitant rates exacted prior to the commencement of any suit for the recovery of any such asserted excessive or illegal rates,
97 and because plaintiffs have not complied therewith no recovery can be had in this suit.

### Twenty-ninth.

The court is respectfully requested to find that said Section 22 provides no remedy for the recovery of excessive and illegal, irregular or exorbitant rates exacted by the defendant common carrier, or any other common carrier; that Section 10 does provide such remedy, and by reason of said plaintiffs ignoring Section 10 in these proceedings no recovery can be had.

### Thirtieth.

The court is respectfully requested to find that Section 22 of the said Act relates to the determination of tariff rates in the future and not for irregular or exorbitant rates exacted in the past.

### Thirty-first.

The court is respectfully requested to find that on the 20th day of November, 1909, Hon. Henry A. Mandell made an order in the so-called rate case, requiring the Michigan Railroad Commission to show cause at a time and place therein named, why a temporary injunction should not issue against said Commission as prayed for in the Bill of Complaint made by the defendant, a copy of which order appears on page 123 of the printed record in said rate case, which copy may be used as if set forth in this finding.

### Thirty-second.

98 That on November 24, 1909, Honorable George S. Hosmer, Circuit Judge of Wayne County, made an order therein restraining the said Commission from putting into operation or making effective, three orders of such Commission, hereinbefore referred to, a copy of which appears on page 152 of the printed record in the rate case, which copy may be used as if set forth in this finding.

### Thirty-third.

That on the 2nd day of December, 1909, a stipulation was entered into in said rate case by and between the attorneys for the respective parties, therein providing that the application for an injunction and the order to show cause made by said court, and the hearing thereon, was to be continued in its then present state until the final determination of such cause upon the merits thereof, of which a copy appears on page 153 of the printed record in the rate case, which copy may be considered as evidence of the original thereof, and may be used as if set forth in this finding.

### Thirty-fourth.

That on the 24th day of January, 1911, the attorneys for said Detroit & Mackinac Railway Company and intervening complainants in the chancery proceedings instituted in the Circuit Court for the County of Wayne, to review the orders of said Michigan Railroad Commission, made and filed in said court and cause a motion for rehearing, which said motion came on to be heard before Judge Murfin on the 11th day of February, 1911, whereupon said Circuit Judge, who made the opinion and decree affirming the decision of

the Railroad Commission, peremptorily refused to grant a hearing on said motion, stating that in view of the fact that the Su-
99 preme Court of the United States would ultimately have to review the case, he would simply deny the motion as a matter of form, etc., of which a copy of said motion and all proceedings had and taken thereunder appears on pages 785-790 of the printed record in the rate case, which copy may be used as if set forth in this finding.

### Thirty-fifth.

That supplemental order declared upon by plaintiffs made by the Michigan Railroad Commission, November 3, 1909, designated as D-188, was made by such Commission without giving the defendant in these causes opportunity to be heard thereon, and without submission of proofs on behalf of either party thereto, providing in such order as follows:

"This order may be rescinded, altered or amended at any time when in the judgment of the Commission, such action should be taken."

A copy of which supplemental order is set forth in the printed record of the rate case at pages 121-123, which copy and the proceedings had and taken prior to the time the same was made, may be treated as if set forth in this finding.

### Thirty-sixth.

That by virtue of all proceedings had and taken subsequent to the making of the three orders declared upon, and by virtue of the contents of such three orders, and by virtue of the decision of the Supreme Court of the State of Michigan, made July 22, 1912, reported in 171 Mich. 335-365, wherein said Supreme Court concluded its decisions as follows:

100 "That decree of the court below is affirmed, but without prejudice to the right of the Railway Company to move the Commission for a modification of its rules as its experience and the facts coming to its knowledge may appear to warrant."

This court is unauthorized to render judgments in favor of plaintiffs as indicated in the court's findings filed November 13, 1916, without evidence other than the said three orders to support such judgment, especially on and after the 15th day of August, 1910, that being the date when the last proofs were submitted on the merits as to this action, and as giving to said orders thereafter, any force and effect as prima facie evidence or otherwise as to the reasonableness of such orders.

### Thirty-seventh.

This court is respectfully requested to find that this defendant made and filed answers to the several petitions or complaints declared upon, which said answers are contained in the printed record of the rate case, said answers being found on pages 4-8, 11-16, 21 of such printed record, the same to be treated as if set forth in this finding.

### Thirty-eighth.

The court is respectfully requested to find that the stipulations attached to the several bills of particulars in the instant cases, were of no force and effect other than a determination of a correct computation of the shipments to or by the several plaintiffs as indicated in such bills of particulars; such stipulations being made solely to avoid a reference for computation and to avoid taking the time of the court in proving the correctness of the figures contained
101 in such bills of particulars.

### Thirty-ninth.

Wherever in these requests we have made reference to the printed record in the rate case, it is understood that the same applies to the printed record used on the trial of these cases involving proceedings had and taken by the Michigan Railroad Commission in connection with its three several orders declared upon by the plaintiffs, and all proceedings thereafter had and taken pursuant thereto.

### Fortieth.

The court is respectfully requested to find that the provisions of Act 300 of the Public Acts of 1909 whereby any lawful orders made by said Commission shall not take effect and become operative until twenty days after the service of a certified copy on such common carrier, includes the provisions of such orders as set forth therein, and that the enforcement of such orders must be pursuant to the requirements therein contained in the order designated. That is to say, the posting and publishing of such orders shall have precedence in such enforcement; and the twenty day period is a provision designed to advise the shipper and the Commission of the necessity of the enforcement of such order, unless complied with by the common carrier.

### Forty-first.

The court is respectfully requested to find that the rebate provisions in the tariffs of the defendant railway company and in the orders of the Railroad Commission are in violation of the provisions of said Act 300, prohibiting rebates as indicated in sections
102 16, 17 and 18 of the Act hereinbefore referred to.

### Forty-second.

The court is respectfully requested to find that all common law remedies for irregular or exorbitant charges by railroad companies in the State of Michigan, for the carriage of freight, have been superceded and abolished by Sub-section (*g*) of Section 10, of the Act for the regulation of common carriers, being Act 300 of the Public Acts of 1909.

## Forty-third.

Sec. 22 of Act 300 aforesaid authorizes the Railroad Commission (subject to the provision of the act referred to) to "fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future, and such classifications, regulations, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed, or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory." The orders relied upon by the plaintiffs allege that the rates charged are unjust, unreasonable and excessive. (Order D-188.)

There is nothing in the order or orders of the Railroad Commission indicating their judgment as to the rates named by the railroad Commission, notwithstanding the fact that they assert that such rates "should be reduced as hereinafer set forth."

The statutes relied upon by the plaintiffs require a determination on behalf of the Railroad Commission as to the justice and reasonableness of the rates named by them, and having failed to
103 make such determination, such orders are void.

## Forty-fourth.

After the Railroad Commission had made the orders declared upon by the plaintiff, the subject matter of such orders was continuously involved in legal proceedings, authorized by law; had the defendant applied to the commission for a different and higher rate until the questions involved in litigation were determined, two proceedings for the determination of the same question would have been pending, viz: the duly authorized legal proceedings to determine the legality and effectiveness of the orders or certain parts thereof, and proceedings before the commissioners for the purpose of obtaining the same results. The defendant could not appeal from an order of the Railroad Commission respecting the rates, and at the same time institute proceedings for the sole purpose of obtaining a like determination.

Had the defendant complained to the Michigan Railroad Commission because of the rates in the orders referred to, being inadequate, the Commission to be consistent would have denied the relief prayed for. The right to appeal in that proceeding would have obtained, and the anomalous situation would be two appeals, by the same parties, respecting the same question, by reason thereof, the plaintiffs in the instant case are not entitled to judgment as indicated in the court's findings.

Dated this 22nd day of November, 1916.

JAMES McNAMARA,
*Attorney for Defendant.*
FRED A. BAKER,
HENRY & HENRY,
WEADOCK & DUFFY,
*Of Counsel for Defendant.*

104 *Plaintiff's Requests for Findings of Facts.*

(Filed Nov. 27, 1916.)

The plaintiff requests the court to file certain additional findings of fact as contained in copies of said proposed findings annexed hereto and served herewith.

GILLETT & CLARK,
*Attorneys for Plaintiff.*

To James McNamara, Henry & Henry, Fred A. Baker, Weadock & Duffy, Attorneys and Of Counsel for Defendant.

SIRS: Take notice that the above is a true copy of request for additional findings of fact this day filed in the above entitled cause and that annexed thereto is a true copy of the said proposed findings all of which will be presented to the Hon. L. P. Coumans, Circuit Judge, for his approval and signature on Monday, November 20, 1916, at the opening of court on that day or as soon thereafter as counsel can be heard.

Yours, etc.

GILLETT & CLARK,
*Attorneys for Plaintiff.*

105 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

*Additional Findings of Fact.*

1. On January 20, 1909 defendant filed its freight tariff known as M. R. C. No. 205, made effective February 1, 1909. A copy is found in 171 Mich. on pages 353-354 which is to be treated as if set forth herein.

2. On February 8, 1909, defendant filed its freight tariff known as M. R. C. No. 208, made effective February 20, 1909. A copy is

found in 171 Mich. on page 354, and may be treated as if set forth herein.

3. On February 23, 1909, the Fletcher Paper Company filed a complaint before the Michigan Railroad Commission which is set forth on pages 1-4 *on* the printed record filed in the Michigan Supreme Court in the case reported in 171 Mich. on page 335 (hereafter for convenience referred to as the "rate case." This copy is referred to with the same effect as if set forth in this finding.

4. On March 3, 1909, defendant filed a tariff, effective March 14, 1909 increasing the switching charge between Alpena and Fletcher's Dam from $2.00 to $5.00 per car.

5. On March 11, 1909, Fletcher Paper Company filed a
106 complaint before the Michigan Railroad Commission, a copy
of which is found on pages 9-11 of the printed record in the rate case, which copy may be treated as if set forth in this finding.

6. On April 19, 1909, Frank W. Gilchrist and others filed a complaint before the Michigan Railroad Commission a copy of which is found on pages 18-20 of the printed record in the rate case, and is to be treated as if set forth in this finding.

7. On April 24, 1909, the Fletcher Paper Company filed a complaint before the Michigan Railroad Commission a copy of which appears on pages 22-24 of the printed — in the rate case which copy may be treated as if set forth in this finding.

8. Issue was joined and evidence submitted to the Michigan Railroad Commission and hearings were had upon the merits of the petitions above mentioned.

9. On October 19, 1909, the Michigan Railroad Commission made an order a copy of which is found on pages 120-121 of the printed record in the rate case and may be treated as if set forth in this finding.

10. A certified copy of the order last mentioned was served on defendant on November 4, 1909.

11. On October 22, 1909, the Michigan Railroad Commission made an order a copy of which is found on pages 118-11*8* of the printed record in the rate case, which copy may be treated as if set forth in this finding.

12. A certified copy of the order last mentioned was served
107 on defendant on November 1, 1909.

13. On November 3, 1909, the Michigan Railroad Commission made an order a copy of which is found on pages 121-123 of the printed record in the rate case, which copy may be treated as if set forth in this finding.

14. A certified copy of the order last mentioned was served on the defendant on November 6, 1909.

15. On November 20, 1909, defendant filed a bill of complaint in the Circuit Court for the County of Wayne in chancery, a copy of which with the exhibits thereto annexed appear on pages 123-151 of the printed record in the rate case, which copy may be treated as if set forth in this finding.

16. On February 3, 1910, by an order of the circuit court for the County of Wayne in chancery, Frank W. Gilchrist, Churchill Lum-

ber Company, Island Mill Lumber Company and the Fletcher Paper Company were permitted to intervene as defendants to the bill of complaint last mentioned.

17. Issue was joined in the case last mentioned and much testimony taken therein, and such testimony was certified back from the Circuit Judge to the Michigan Railroad Commission.

18. On November 15, 1910, the Michigan Railroad Commission submitted to and filed in the Circuit Court for the County of Wayne in chancery a report, of which a copy appears on pages 769-770 of the printed record in the rate case which copy may be used as if set forth in this finding.

108 19. On January 21, 1911, the Hon. James O. Murfin, one of the Circuit Judges of the County of Wayne filed his opinion, a copy of which appears on pages 771-785 of the printed record in the rate case and may be treated as if set forth in this finding.

20. On February 11, 1911, a decree was entered in the Circuit Court for the County of Wayne in chancery, a copy of which appears on pages 791-792 of the printed record in the rate case, which copy may be treated as if set forth in this finding.

21. Proceedings were duly taken for an appeal by defendant to the Supreme Court of the State of Michigan, a hearing was there had, and a decision rendered on July 22, 1912, affirming the decree of the circuit court for the County of Wayne in chancery, which decision is reported in 171 Mich. 335.

22. A decree of the Supreme Court of Michigan in accordance with the opinion last mentioned was entered on July 29, 1912.

23. On August 17, 1912, defendant filed a bill of complaint in the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity, a copy of which with the exhibits thereto annexed appears on pages 1-20 of the printed record filed in the Supreme Court of the United States in the case reported in 235 U. S. 402 which copy may be used as if set forth in this finding.

24. A hearing was held in the case last mentioned and an opinion rendered therein on March 22, 1913, a copy of which is reported in 203 Fed. 864 and may be treated as if set forth in this finding.

109 On the same date the District Court aforesaid entered an order denying the motion for an injunction in the case last mentioned.

25. On July 25, 1914, the Supreme Court of Michigan filed an opinion granting a writ of mandamus as appears from the said opinion reported in 182 Mich. 234.

26. On December 14, 1914, the Supreme Court of the United States filed its opinion and entered its decree affirming the order of the District Court of the United States for the Eastern District of Michigan as appears from the said opinion as reported in 235 U. S. 402.

27. On December 28, 1914, the District Court of the United States for the Eastern District of Michigan entered a decree dismissing the bill of complaint therein filed as aforesaid.

28. On February 4, 1915, the Supreme Court of Michigan filed its opinion reported in 184 Mich. 242.

29. On February 8, 1915, defendant issued a certain tariff known as G. F. D. No. 775-A, a copy of which is contained in plaintiff's declaration herein, and may be treated as if set forth in this finding.

30. Plaintiff is a Michigan corporation engaged in the manufacture of paper from forest products.

31. The facts and figures set forth in plaintiff's bill of particulars are true and correct and may be treated as if set forth in this finding.

110 32. The facts and figures set forth in the schedule annexed to the deposition of Henry E. Fletcher are true and correct, and may be treated as if set forth in this finding.

33. In the manufacture of paper by plaintiff, the forest products received over the line of defendant's railroad are necessarily mingled and confused with forest products received from other sources, so that it is impossible to identify any portion of the finished product as manufactured from any specific log or group of logs received.

34. The facts and figures set forth in the schedules annexed to the deposition of Warren Penniman as Exhibits 34 and 35 are true and correct, and may be treated as if set forth in this finding.

35. When plaintiff paid to defendant the various sums for which recovery is sought herein, defendant's representatives receiving such payments stamped upon the receipts (called expense bills) an endorsement substantially as follows: "paid under protest," or "Paid under protest on account of excessive charges, Fletcher Paper Company, by W. F. Victor, Treas."

36. The difference between the amount shown by plaintiff's bill of particulars and the amount for which plaintiff is permitted to recover, represents over-charge paid prior to November 24, and November 26, 1909.

L. P. COUMANS,
*Circuit Judge.*

111 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

*Additional Findings of Fact.*

(1-29) As findings 1 to 29 inclusive I adopt numbers 1 to 29 inclusive of my findings in the Fletcher Paper Company case which shall be treated as if made and filed herein.

(30) Plaintiff is a Michigan corporation engaged in the operation of a saw mill for the manufacture of lumber from logs.

(31) The facts and figures set forth in plaintiff's bill of particu-

lars are true and correct and may be treated as if set forth in this finding.

(32) The facts and figures set forth in the interest statements annexed to the deposition of Roy Richardson as Exhibits 1 and 2 are true and correct and may be treated as first set forth in this finding.

(33) The first payment of freight made by plaintiff to defendant after the making of the orders by the Michigan Railroad Commission above mentioned was accompanied by a tender and refusal of the rates fixed by the Commission. Thereafter plaintiff's president asked defendants' freight and passenger agent at Alpena if it 112 was necessary to continue making such tenders. Said freight and passenger agent replied that he had been instructed by his superiors not to accept such tenders and that he would continue to refuse them until plaintiff was notified to the contrary. Thereafter payments were made under protest and certain of the expense bills were stamped "Paid under protest."

(34) The difference between the amounts shown by plaintiff's bill of particulars and the amount for which plaintiff is permitted to recover represents over-charges paid prior to November 26, 1909.

L. P. COUMANS,
*Circuit Judge.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

*Rulings on Defendant's Requests to Modify and Add to the Opinion, Findings of Fact, and Conclusions of Law Made Herein.*

(Filed Nov. 27, 1916.)

The first request made by defendant is refused.

The second request is refused.

The third request is refused.

The fourth request is refused.

113 The fifth request is refused.

The sixth request is refused.

The seventh request is refused.

In respect to the eighth request, defendant was given an opportunity to submit proofs at the close of the proofs offered by plaintiffs. Defendant then made an offer to submit proof of certain facts which I have determined to be inadmissible and I have, therefore, sustained the objections to such offer. The evidence relied upon by plaintiffs is apparently undisputed, and counsel for all parties stated in open court that a jury was waived because the questions to be decided were entirely questions of law. I have no desire to exclude any competent evidence in behalf of the defendant, but in view of my understanding of the situation, as above explained, I think that the eighth request should be refused and therefore refuse the same. Defendant's right will be protected by the inclusion in the record of defendant's offer of proof made at the close of plaintiff's evidence.

The ninth request is refused.

The tenth request is refused.

The eleventh request is refused.

In respect to the twelfth request, the special counts of plaintiff's declarations show to what extent plaintiffs rely upon the statute and to what extent upon the common law. The nature of the proofs submitted by plaintiffs shows that the claims made by plaintiffs upon this hearing are based upon these special counts and there has been no indication of any other or inconsistent claims based upon the common counts or otherwise. Plaintiffs are not taking any inconsistent positions and I see no ground for requiring any election. The twelfth request is therefore refused.

The thirteenth request is refused for the same reason.

114 The circumstances which will authorize proceedings pursuant to section 10 of Act 300 of 1909 are the circumstances mentioned in that section. The same is true with respect to section 22 of the act. Except as herein stated the fourteenth request is refused.

The fifteenth request is refused for the reasons stated with respect to the eighth request.

The sixteenth request is refused for the reasons stated with respect to the eighth request.

The seventeenth request is refused.

The eighteenth request is refused.

The nineteenth request is refused.

I find as requested by the twentieth request so far as concerns the effect of the demurrer and the proceedings thereon, upon my decision of the case, and state that my decision has been formed independently and has not been controlled by the opinion on the demurrer. The language of the twentieth request is possibly too broad to be precisely accurate and I, therefore, make my finding in this form rather than in an unqualified granting of the request.

The twenty-first request is refused.

The twenty-second request is refused, and in respect to the subject of such request I find that the hearts of veneer logs are to be treated like slabs and sawdust, as incidental by-products which can be ignored in considering the reshipment of manufactured product.

The twenty-third request is refused.

The twenty-fourth request is refused.

The twenty-fifth request is refused.

The twenty-sixth request is refused.

The twenty-seventh request is refused.

The twenty-eighth request is refused.

The twenty-ninth request is refused.

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In regard to the thirtieth request, it is impossible to gen-
eralize accurately in a few lines in respect to the anplication
ion 22 of the statute. The section is plainly expressed and no
lization in regard to its application is necessary for the deter-
on of this case.
thirtieth request is therefore refused.
thirty-first request is granted except that I consider it unnec-
and inadvisable to attempt to state the substance of any docu-
of importance, otherwise than by literal quotation. I, there-
nd as follows in answer to the thirty-first request.
the twentieth day of November, 1909, Hon. Henry A. Mandell
an order in the so-called rate case, a copy of which order ap-
on page 123 of the printed record in said rate case, which copy
e used as if set forth in this finding.
answer to the thirty-second request and in pursuance of a
tion admitting the printed record in evidence as proving it-
d its contents with the same effect as if duly authenticated and
d, I find that on November 24, 1909, Thomas F. Farrell, regis-
the Circuit Court for the County of Wayne in chancery, signed
register a document of which a copy appears on page 152 of
inted record in the rate case, which copy may be used as if set
in this finding.
answer to the thirty-third request, I find that on the second
December, 1909, a stipulation was signed as appears by a
ound on page 153 of the printed record in the rate case which
nay be used as if set forth in this finding.
answer to the thirty-fourth request I find that on the twenty-
day of January, 1911, the attorneys for said Detroit & Macki-
nac Railway Company and intervening complainants in the
chancery proceedings instituted in the Circuit Court for the
County of Wayne to review the orders of the said Michigan
ad Commission, made and filed in said court and cause a mo-
or a rehearing which said motion came on to be heard before
Murfin on the eleventh day of February, 1911, whereupon
statements were made and proceedings taken in respect to
otion and the same was denied as appears on pages 785-790
printed record in the rate case which copy may be used as if
rth in this finding.
thirty-fifth request is denied.
thirty-sixth request is denied.
thirty-seventh request is granted, and I therefore find that the
lant made and filed answers to the several petitions or com-
s before the Michigan Railroad Commission which said an-
are contained in the printed record of the rate case, said an-
being found on pages 4-8, 11-16, 21 of such printed record,
me to be treated as if set forth in this finding.
thirty-eighth request is refused for the reason that the force
ffect of the stipulations are explained more clearly and accu-
by the stipulations themselves than by the thirty-eighth re-
and because the stipulations need no explanation by the court.
thirty-ninth request is granted and I hereby find that when-

ever reference is made to the printed record in the rate case it is understood that the same applies to the printed record offered in evidence herein as Exhibit 1, being a copy of the printed record filed in the supreme court of Michigan in the case reported in 171 Mich. 335.

The fortieth request is refused.

The forty-first request is refused.

The forty-second request is refused.

The forty-third request is refused.

117 The forty-fourth request is refused.

L. P. COUMANS,
*Circuit Judge.*

### *Judgment Entry and Ruling on Motion for Double Damages.*

(Filed November 27, 1916.)

On November 27, 1916, an order was entered denying plaintiff's motion for double damages and entering judgment for plaintiff in the sum of $28,239.65.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

### *Exceptions to Denial Double Damages.*

(Filed November 27, 1916.)

Now comes the said plaintiff and excepts to the order of the court denying plaintiff's motion to double the damages sustained by plaintiff herein in whole or in part.

GILLETT & CLARK,
*Attorneys for Plaintiff.*

On November 27, 1916, after the filing of the Court's opinion Nov. 13th, 1916 and the filing of requests for additional findings of both parties pursuant to notice and agreement of counsel, a hearing was had before the Court on the foregoing requests; at 118 the conclusion of arguments on behalf of all parties to the suit the following proceedings were had.

The Court: When the findings in this case were made and filed by the court the question of additional time before the entry of judgment was taken up with the court by Mr. McNamara's petition, and it was understood at that time that by granting the time from the 20th to the 27th, which is today, that the matter should be closed up.

Now it may be some advantage to the defendant in this case to have it appear of record, but it would be utterly impossible for the court, with the limited time he can sit here as a court to take this case and go through it and give satisfactory reasons, and the various requests that have been made by the defendant, and if he overrules them, and whatever is done has got to be done today, or not later than tomorrow, as the changed conditions here will make that necessary. The court will retire probably the day after tomorrow, I am not advised as to the exact time, but Mr. Houghton told me a week ago and the record can show that he succeeds me here as judge, that he would not qualify until the first of the month. I have been informed since that time that he is to qualify on the 29th of this month so that I don't see how I could, even if inclined to do so, go into the matter any more elaborately, if I deny these requests and show reasons for them, than as stated in the findings Mr. Clark has filed here, to be adopted if I adopt them,—I want to get this matter off my hands, and I think it is to the interest of everybody to close
it up now and not be submitted to Judge Houghton or some-
119 body afterwards, because it will cause undoubtedly a lot of
time and delay, and it seems to me that the court of last resort in this State will be able to protect the rights of defendant fully, because you have your requests there covering as I read it every phase of the case known to me, and if they are denied you are square on your rights. To get this matter in the condition I think it should be in I shall sign the findings as prepared by the plaintiff with the addition of the forty-third and forty-fourth requests which were refused.

There has been some amendment suggested to the findings of defendant in an amendment filed later as to the proper wording of these requests, and I understand there will be no objection to their being allowed, and they may stand as they appear to be amended by the findings filed. If there is any other question.

Mr. McNamara: As I understand your honor will enter an order denying all of our requests? What we object to is adopting the language of Mr. Clark in explanation of certain requests.

The Court: Well, the court will say that while that is the language of Mr. Clark, I have gone over those and have had that paper before me for several days, and I will adopt that as my own language in the case, and the additional findings that Mr. Clark asks for will be filed and allowed.

Mr. Clark: I have not presented here today the motion for double damages, but it has been filed, and I assume that your Honor has your mind settled on that subject, and the order will be made overruling the motion.

The Court: The order will be made overruling the motion for double damages.

120 Mr. Clark: I have here a computation of the amount of each judgment under the statute. The statute provides for the charging of interest on the findings, that means two weeks' interest on each of these amounts. Will you gentlemen take my computation of two weeks' interest on each of the findings?

Mr. McNamara: There seems to be some misunderstanding between us with reference to what the court has now held. Mr. Clark prepared certain additional facts which are I think in addition some 35 or 36 of them here.

The Court: In addition to what the court finds in the findings?

Mr. McNamara: Yes.

The Court: Well, what I stated, I think it was that those would be allowed and incorporated as my findings in the case.

Mr. McNamara: Then the other paper that Mr. Clark prepared with reference to the findings, I understand the court adopts that too?

The Court: Yes, adopts that, and to make your record right you want to add that the forty-third and forty-fourth request is refused.

Mr. Henry: In regard to your request that we concede, your computation we have spent very little time on the question of figures; we assume that so far as the computation is concerned where made it is correct, but we intend to go over the figures and any errors at any time of course can be corrected.

121 Mr. Clark: Yes. Of course somebody has got to determine the amount on which judgment shall be entered. 14 days' interest on $1.00 is .00194. I have taken each finding and multiplied it by that figure, is all I have done.

Mr. Henry: Rather than concede the correctness either make proof or submit it to the court, because we haven't given any attention to the computation at all.

Mr. Clark: I suppose the order overruling the motion for double damages is merely an order entered in the journal until signed.

The Court: Well, I don't think so. The journal will be signed as of today.

Mr. Clark: A journal entry overruling the plaintiff's motion for double damages in each case.

The Court: Have you agreed upon the figures?

Mr. Clark: Counsel don't wish to agree, because they don't wish to waive anything, but I will state I have made a computation which has been checked up and is correct, which amounts to a little less than two tenths of one per cent on each amount for the 14 days. I have the figures here that I shall be sworn regarding it if counsel wishes.

Mr. Henry: I note counsel is having an order entered by the clerk upon an order of the court. Now there are numerous motions made, one to dismiss, one to elect, and other like things. I didn't understand it would be necessary to have orders entered by the court more than overruling the double damages.

122 Mr. Clark: Well, you have something on the record and I have not. You have the court's findings in which he denies your requests but nothing to show about my motion for double damages. I have made a formal motion to double the verdict, which I have to do. The court stated in his original opinion that this is

premature and the matter was not before the court until this morning.

The Court: It couldn't be until the other question was settled.

The Court: I don't think so. I think you are fully protected on that.

Mr. Henry: We in like manner made specific motions here in reference to election. Should they be entered?

Mr. Clark: Let the record show that I consent at any time to the entry of any order overruling any of your motions that you wish to enter in the record to make the record complete, if that helps you any.

Mr. Henry: We don't think it is necessary.

Mr. Clark: Neither do I.

The Court: However, if you discover it is you have your record on it.

Edward S. Clark, having been duly sworn testified as follows:

I have computed 14 days' interest on the amounts found by the
court in each of these cases, making the amount with interest
123 to this date for which judgment should be entered as follows:
Fletcher Paper Co., $25,788.76; Richardson Lumber Co., $28,239.65; Island Mill Lumber Co., $24,534.33; Churchill Lumber Co., $14,336.13; Michigan Veneer Co., $6,058.19.

I now move for an entry of judgment in each of these case for these amounts.

T*ur* Court: Do you want any objection to that on record?

Mr. Henry: Yes, I think we will have it understood for the reasons filed in the case we object to the entry of judgment as asked for in each of the five cases.

The Court: The motion will be granted, and judgment entered.

Mr. Henry: The court will grant us an exception, if it is necessary.

The Court: Yes.

Mr. McNamara: We would like to have the usual stay of proceedings in this case if your honor please.

The Court: No objection to that.

Mr. Clark: I want to have the record show that in moving for entry of judgment in these amounts I do not waive my claim that they should be doubled before judgment is entered.

The Court: Those judgments will be entered so the journal can be signed today.

124 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

Cal. No. 10211.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Cal. No. 10216.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Cal. No. 10220.

ISLAND MILL LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Cal. No. 10221.

MICHIGAN VENEER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Cal. No. 10222.

CHURCHILL LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

*Exceptions.*

Now comes the defendant in the causes and court above
125 entitled and takes exception to the opinion, findings of fact
and conclusions of law made and filed therein by the court
and the judge thereof as of date November 13, 1916. This general
exception is in addition to and made a part of the exceptions made
and filed on behalf of defendant of date November 15, 1916.

The defendant further comes into this court and alleges that the specific exceptions made on behalf of defendant November 15, 1916, in the cause above entitled as Fletcher Paper Company, plaintiff, vs. Detroit & Mackinac Railway Company, defendant, Cal. No. 10211, each and all of them apply to each and every one of the five several suits and actions hereinbefore entitled.

This defendant by its attorney and counsel pursuant to the rules of this court and the statutes controlling the same, further comes into this court and alleges exceptions to the opinion, findings of fact and conclusions of law made and filed in each of the several causes above entitled, being the additional findings of fact specifically set forth by and on behalf of plaintiffs by their attorneys, in thirty-six (36) specifically numbered paragraphs having been made and signed by said court and the judge thereof and filed in the several causes above entitled on, to-wit: the 27th day of November, 1916.

This defendant further comes into this court by its attorneys and counsel and alleges exceptions to the additional findings of fact in the case of Richardson Lumber Company, a corporation, plaintiff, vs. Detroit & Mackinac Railway Company, a corporation, defendant, Cal. No. 10216, said additional findings of facts consisting of thirty-four (34) specifically numbered paragraphs asserted to be applicable to the cause last referred to, which said findings of fact were made by this Court and signed by the judge thereof and filed in
126 this cause, on to-wit, the 27th day of November, 1916.

This defendant further comes into this court by its attorney and counsel and alleges exceptions to the additional findings of fact in the case of Island Mill Lumber Company, a corporation, plaintiff, vs. Detroit & Mackinac Railway Company, a corporation, defendant, Cal. No. 10220, said addition- findings of facts consisting of 34 specifically numbered paragraphs asserted to be applicable to the cause last referred to, which said findings of fact were made by this Court and signed by the judge thereof and filed in this cause on, to-wit, the 27th day of November, 1916.

This defendant further comes into this court by its attorney and counsel and alleges exceptions to the additional findings of fact in the case of Michigan Veneer Company, a corporation, plaintiff, vs. Detroit & Mackinac Railway Company, a corporation, defendant, Cal. No. 10221, said additional findings of facts consisting of thirty-four specifically numbered paragraphs asserted to be applicable to the cause last referred to, which said findings of fact were made by this Court and signed by the Judge thereof and filed in this cause on, to-wit, the 27th day of November, 1916.

This defendant further comes into this court by its attorney and counsel and alleges exceptions to the additional findings of fact in the case of Churchill Lumber Company, a corporation, plaintiff, vs. Detroit & Mackinac Railway Co., a corporation, defendant, Cal. No. 10222, said additional findings of facts consisting of thirty-four specifically numbered paragraphs asserted to be applicable to the cause last referred to, which said findings of fact were made by this court and signed by the judge thereof and filed in this cause on, to-wit: the 27th day of November, 1916.

127 This defendant further comes into this court by its attorney and counsel and alleges exceptions to the refusal of this court and the judge thereof to grant the defendant's request as follows:

### First.

Defendant alleges exceptions to the refusal of this court to grant defendant's 1st, 2nd, 3rd, 4th, 5th, 6th and 7th requests for findings of fact and conclusions of law as specifically set forth in behalf of defendant in such requests.

### Second.

This defendant further alleges exceptions to the refusal of this court to grant defendant's eighth request and excepts to the finding of this court in connection with said eighth request as follows:

"Defendant was given an opportunity to submit proofs at the close of proofs offered by plaintiffs. Defendant then made an offer to submit proof of certain facts which I have determined to be inadmissible and I have, therefore, sustained the objection to such offer.

The evidence relied upon by plaintiffs is apparently undisputed and counsel for all parties stated in open court that a jury was waived because the questions to be decided were entirely questions of law. I have no desire to exclude any competent evidence in behalf of defendant, but in view of my understanding of the situation as above explained, I think that the eighth request should be refused, and therefore, refuse the same. Defendant's rights will be protected by the inclusion in the record of defendant's offer of proof made at the close of plaintiff's evidence."

128 The defendant excepts to the finding and statement of the court as above quoted.

### Third.

In like manner the defendant now here excepts to the refusal of the court to grant the defendant's ninth, tenth and eleventh requests.

### Fourth.

In like manner the defendant excepts to the refusal of the court to grant the defendant's twelfth request and excepts to the statement of the court in connection with such twelfth request as follows:

"In respect to the twelfth request the special counts of plaintiffs' declarations show to what extent plaintiffs rely upon the statute and to what extent upon the common law.

The nature of proofs submitted by plaintiffs shows that the claims made by plaintiffs upon this hearing are based upon these special counts, and there has been no indication of any other or inconsistent claims based upon the common counts or otherwise. Plaintiffs are not taking inconsistent positions, and I see no ground for requiring any election. The twelfth request is therefore refused."

### Fifth.

In like manner the defendant excepts to the refusal of the court to grant its thirteenth request.

### Sixth.

In like manner the defendant alleges exception to the refusal of the court to grant its fourteenth request and excepts to the
129 statement made in connection therewith on behalf of the court as follows:

"The circumstances which will authorize proceedings pursuant to Section 10 of Act 300 of 1909 are the circumstances mentioned in that section. The same is true with respect to Section 22 of the Act. Except as herein stated the fourteenth request is refused."

### Seventh.

In like manner the defendant excepts to the refusal of the court to grant its fifteenth request.

### Eighth.

In like manner the defendant excepts to the refusal of the court to grant its sixteenth request.

### Ninth.

In like manner the defendant excepts to the refusal of the court to grant is seventeenth, eighteenth and 19th requests.

### Tenth.

In like manner the defendant excepts to the refusal of the court to grant its twentieth request and excepts to the statement of the court in connection with such refusal as follows:

"I find as requested by the twentieth request so far as concerns the effect of the demurrer and the proceedings thereon upon my decision of the case, and state that my decision has been formed independently and has not been controlled by the opinion on the demurrer. The language of the twentieth request is possibly too
130 broad to be precisely accurate, and I therefore make my finding in this form rather than in an unqualified granting of the request."

### Eleventh.

In like manner the defendant excepts to the refusal of the court to grant its twenty-first request.

### Twelfth.

In like manner the defendant excepts to the refusal of the court to grant its twenty-second request and excepts to the finding of the court with reference thereto, wherein the court states as follows:

"Twenty-second request is refused, and in respect to the subject of such request, I find that the hearts of veneer logs are to be treated like slabs and sawdust, as incidental by-products which can be ignored in considering the re-shipment of the manufactured product."

### Thirteenth.

In like manner defendant excepts to the refusal of the court to grant its twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth and twenty-ninth requests.

### Fourteenth.

In like manner the defendant excepts to the refusal of the court to grant its 30th request and excepts to the statement of the court in connection therewith as follows:

"In regard to the thirtieth request, it is impossible to generalize accurately in a few lines in respect to the application of section 22 of the statute. The section is plainly expressed and no generalization in regard to its application is necessary for the determination of this case." 131

### Fifteenth.

In like manner the defendant excepts to the granting of a modification of its thirty-first request and excepts to the statement of the Court in connection therewith as follows:

"The thirty-first request is granted except that I consider it unnecessary and inadvisable to attempt to state the substance of any document of importance, otherwise than by literal quotation. I, therefore, find as follows in answer to the thirty-first request:

On the 20th day of November, 1909, Hon. Henry A. Mandell made an order in the so-called Rate Case, a copy of which order appears on page 123 of the printed record in said Rate case, which copy may be used as if set forth in this finding."

To the extent that the foregoing finding conflicts with the defendant's thirty-first request, defendant excepts thereto.

### Sixteenth.

Wherein the statement of the court and its finding with respect to defendant's thirty-second request is modified by the court, exception is taken thereto, and in like manner defendant excepts to the statement and modified finding of the court wherein the court in reference to said thirty-second request states:

"In answer to the thirty-second request and in pursuance of a stipulation admitting the printed record in evidence as proving itself and its contents, with the same effect as if duly authenticated and certified, I find that on November 24, 1909, Thomas F. Farrell, Register of the Circuit Court for the County of Wayne, 132 in chancery, signed as such register a document of which a copy appears on page 152 of the printed record in the Rate Case, which copy may be used as if set forth in this finding."

### Seventeenth.

In like manner defendant excepts to the court's refusal to grant its thirty-third request as therein set forth and excepts to the court's finding whereby he limits the same as follows:

"In answer to the thirty-third request, I find that on the 2nd day of December, 1909, a stipulation was signed as appears by a copy found on page 153 of the printed record in the Rate case, which copy may be used as if set forth in this finding."

### Eighteenth.

In like manner the defendant excepts to the refusal of the court to grant its thirty-fourth request and excepts to the court's modification thereof in the following language:

"I find that on the 24th day of January, 1911, the attorneys for said Detroit & Mackinac Railway Company and intervening complainants in the chancery proceedings instituted in the Circuit Court for the County of Wayne, to review the orders of said Michigan Railroad Commission, made and filed in said court and cause a motion for a rehearing, which said motion came on to be heard before Judge Murfin on the 11th day of February, 1911, whereupon certain statements were made and proceedings taken in respect to said motion, and the same was denied as appears on pages 785-790 of the printed record in the Rate case, which copy may be used as if set forth in this finding."

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### Nineteenth.

In like manner the defendant excepts to the refusal of the court to grant its thirty-fifth and thirty-sixth requests.

### Twentieth.

In like manner the defendant excepts to the refusal of the court to grant its thirty-eighth request and in stating in connection therewith:

"The thirty-eighth request is refused for the reason that the force and effect of the stipulations are explained more clearly and accurately by the stipulations themselves than by the thirty-eighth request, and because the stipulations need no explanation by the Court."

### Twenty-first.

In like manner the defendant excepts to the refusal of the court to grant its 40th, 41st, 42d, 43d and 44th requests.

### Twenty-second.

Defendant by its attorney and counsel alleges exceptions to the refusal of the court to pass specially on the requests and points made on behalf of defendant by their first, second, third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-fifth, thirty-sixth, fortieth, forty-first, forty-second, forty-third and forty-fourth requests as presented to the court and duly filed on the 27th day of November, 1916.

134 It is contended on behalf of the defendant that it was the duty of the Court to take each of said requests and traverse the same, specially indicating the court's reasons for denying the same and specially passing judgment upon the points and questions raised in such requests, whereby the defendant and the parties to the several suits became and were apprised of the court's judicial determination of such points and questions.

By reason of the court's refusal to so pass specially upon such requests, defendant now here takes exception thereto.

### Twenty-third.

Exception is taken by and on behalf of the defendant by reason of the fact that the court did not specify in writing the facts found and conclusions of law therein upon the requests of the defendant, as required by sec. 14, Act 314, Public Acts 1915, commonly known as the "Judicature Act."

### Twenty-fourth.

Pursuant to Circuit Court rule 45, and pursuant to the statute last hereinbefore referred to, defendant by its attorneys and counsel requested the court in writing by forty-four (44) several written requests for findings of fact and conclusions of law as in said requests contained. That as to all of such requests, excepting however, the eighth, twelfth, fourteenth, fifteenth, sixteenth, nineteenth, twenty-second, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-seventh, thirty-eighth and thirty-ninth of such requests the court passed upon such requests with the words "Request is refused,"
and did not make any findings of fact nor conclusions of
135 law in reference thereto. Wherefore, the defendant excepts
thereto contending that it became and was the duty of the
court to review such requests, and the subject-matter of each of such

requests, and thereafter, in writing, indicate the judgment, opinion and finding of the court as to the facts called for by such requests, and for the conclusions of law called for by such requests.

### Twenty-fifth.

Defendant, by its attorneys and counsel, made, filed and presented to the Court in the causes above entitled, before judgment was entered therein, requests, asking the court to find specially on each of such requests as to the facts and conclusions of law which the court declined to do. It further became the duty of the court to pass upon such requests as herein indicated in writing, and forthwith file the same with the clerk of the court and enter judgment thereon. By reason of the failure of the court so to do, the defendant now here excepts to the same.

Independent of the proposed findings of facts and conclusions of law, and independent of the written requests made on behalf of defendant for special findings of fact and conclusions of law; in open court the motions heretofore made on behalf of defendant requiring the plaintiffs to elect under what law or procedure they demanded judgments, such motion was denied, and exception now here taken thereto.

Also in open court the motion to dismiss the proceedings and render a verdict in each case of no cause of action was overruled and denied by the court; exception on behalf of the defendant is hereby taken to such ruling.

Further, in open court and as part of the proceedings had and taken in the several causes hereinbefore entitled the proposed findings of fact and conclusions of law, and amendments to
136 the findings of fact and conclusions of law proposed on behalf
of the plaintiffs were all granted by the court, by reason whereof on behalf of defendant exception is hereby taken.

Also by reason of the fact in open court the requests made by and on behalf of the defendant for findings of fact and conclusions of law were overruled and denied by the court; exception is therefore now here taken on behalf of defendant.

Dated this 29th day of November, 1916.

JAMES McNAMARA,
HENRY & HENRY,
*Attorneys for Defendant.*

To Messrs. Gillett & Clark, Attorneys for Plaintiffs in the several causes above entitled.

SIRS: Take Notice, that the foregoing is a true copy of the exceptions made and taken by and on behalf of the defendant, the original whereof has been filed in such court and causes, if for any reason the foregoing exceptions are not explicit enough, or if for any reason it is required on behalf of the plaintiffs that exceptions be taken in detail to the allowance of the proposed amendments to facts and conclusions of law on behalf of the plaintiffs, and the refusal of the court to grant the several requests by and on behalf of the defendant, by indicating the same, such further, more specific and more in detail exceptions will be made, filed and served.

Respectfully submitted.

JAMES McNAMARA,
HENRY & HENRY,
*Attorneys for Defendant.*

137 STATE OF MICHIGAN,
*County of Alpena, ss:*

Guy D. Henry, being duly sworn, deposes and says that he served a copy of the foregoing exceptions and notice to the plaintiff's attorneys by mailing the same to them to their business address, Bay City, Michigan, on the 30th day of November, 1916, at Alpena, Michigan, the same being so mailed as first-class matter, postage fully prepaid.

GUY D. HENRY.

Subscribed and sworn to before me this 30th. day of November, 1916.

MARIE REINKE,
*Notary Public, Alpena County, Michigan.*

My commission expires August 30th., 1920.

*Motion for New Trial, with Notice and Mr. McNamara's Testimony.*

(Filed Jan. 13, 1917.)

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

The following motion will apply to and be considered in connection with the four other so-called "refund cases" all tried by stipulation in connection with the above entitled cause, such other four cases being as follows:

138 Churchill Lumber Co. v. D. & M. Ry. Co. No. 10221.
Fletcher Paper Co. vs. D. & M. Ry. Co. No. 10211.
Michigan Veneer Co. v. D. & M. Ry. Co. No. 10222.
Island Mill Lbr. Co. v. D. & M. Ry. Co. No. 10220.

In all of which said cases judgments were rendered in said court on the trial of said causes before Honorable Lewis P. Coumans, circuit judge of said court without a — the 27th day of November, A. D. 1916.

Now comes the defendant, the Detroit & Mackinac Railway Company, in the cases hereinbefore designated, by James McNamara and Henry & Henry, its attorneys, with Messrs. Weadock & Duffy and Fred A. Baker, of counsel, and moves the Court to make an order in each of said cases setting aside the judgments rendered therein in said court, and to grant to the defendant a new trial thereof in each of said cases for the following reasons:

1. Because the judgments referred to were unauthorized by Act 300 of the Public Acts of 1909 and amendments thereto.

2. Because the court erred in overruling the motion made on behalf of defendant in each of said cases to dismiss the same at the conclusion of the proofs submitted.

3. Because the three orders made by the Michigan R. R. Commission of date Oct. 19, 1909, Oct. 22, 1909, and November 3, 1909, declared upon by plaintiff and made the basis of recovery of the judgments, were void and of no force and effect.

4. Because the Court erred in overruling defendant's mo-
139 tion that the plaintiffs be required to elect whether they re-
lied upon the act last referred to herein, or on the common law counts.

5. Because the Court erred in its construction of Sections 10, 16, 18, 22, 25 and 26 of Act 300 of the Public Acts of 1909 with amendments.

6. Because these cases were tried before Honorable Lewis P. Coumans, then judge of said court, on to-wit: — jury, such trial commencing on the 19th day of September, 1916 and continued until the 23d day of September, 1916. Thereafter the attorneys for the parties respectively prepared their requests for findings of fact and conclusions of law and submitted the same to the court with arguments, on the 27th day of November, 1916.

That on the day of argument of such requests, the said Honorable L. P. Coumans stated as follows:

"Now, it may be some advantage to the defendant in this case to have it appear of record that it would be utterly impossible for the Court with the limited time he can sit here as a court, to take this case and go through it and give satisfactory reasons and the various requests that have been made by the defendant, if he overrules them, and whatever is done has got to be done today or not later than tomorrow, as the changed conditions here will make that necessary. The Court will retire probably the day after tomorrow. I am not advised as to the exact time, but Mr. Houghton told me a week ago and the record can show that he succeeds me here as judge, that he would not qualify until the first of the month. I have been informed since that time that he is to qualify on the 29th of this month
so that I don't see how I could, even if inclined to do so, go
140 into the matter any more elaborately. If I deny these re-
quests and show reasons for them than as stated in the findings Mr. Clark has filed here to be adopted, if I adopt them,—I want to get this matter off my hands and I think it is to the interest of everybody to close it up now and not be submitted to Judge Houghton, or somebody afterwards, because it will cause undoubtedly a lot

of time and delay and it seems to me that the court of last resort in this state will be able to protect the rights of the defendant fully because you have your requests there covering, as I read it, every phase of the case known to me, and if they are denied you are square on your rights. To get the matter in the condition I think it should be in, I shall sign the findings as prepared by the plaintiff with the addition of forty-third and forty-fourth requests which were refused.

Mr. McNamara: As I understand, your honor will enter an order denying all of our requests. What we object to is adopting the language of Mr. Clark in explanation of certain requests.

The Court: Well, the Court will say that while that is the language of Mr. Clark, I have gone over those and have had that paper before me for several days, and I will adopt that as my own language in the cause and the additional findings that Mr. Clark asks for will be filed and allowed.

Mr. McNamara: Then the other paper that Mr. Clark prepared with reference to our findings, I understand the Court adopts that too?

The Court: Yes, adopts that, and to make your record right, you want to add that the forty-third and forty-fourth request is refused."

The Court also at said time denied each and every objection made on behalf of the defendant to plaintiffs' requests for findings of fact and conclusions of law, and adopted and granted each and every request presented by and on behalf of the plaintiffs for findings
141 of fact and conclusions of law. Likewise the Court adopted and granted each and every objection made by and on behalf of the plaintiffs to the findings of fact and conclusions of law of the defendant, so that judgment was entered by the Court on the 27th day of November, 1916 at the conclusion of arguments, whereby the court adopted and granted all of plaintiffs' requests and all of plaintiffs' objections to defendant's requests, and denied all of the defendant's requests and denied all of defendant's objections to plaintiffs' requests.

7. Because the Court erred in failing to comply with Circuit Court Rule 45 in that the Court did not pass specially on any or all points respecting requests on behalf of both parties for findings of fact and conclusions of law, but instead thereof, adopted the language used by the attorneys for the plaintiffs, without comment, judgment, consideration or opinion other than by signing the papers prepared on behalf of the plaintiffs, except as above stated, and except other comments of like kind.

8. Because the Court erred in not complying with the request of the attorneys for the defendant by passing specially upon all points and requests for findings of fact and conclusions of law in behalf of defendant.

9. Because the Court by reason of the expiration of his office as judge of the Circuit Court for the County of Bay, did not and could not consider or pass judicially upon the numerous requests and objections made by the parties respectively through their respective attorneys.

10. Because the defendant in each of said cases is entitled to the

deliberate judgment and legal consideration of the Circuit Judge
and the Circuit Court in and for the County of Bay, which
142 legal judgment and consideration was not given to the numerous
questions and requests by reason of the fact that the
judge who heard said cause was incapable of so doing on account of the termination of his office as such judge.

This Motion is based upon the files and records in this cause, upon the testimony taken therein, and upon all the proceedings had and taken upon which such judgments were rendered.

11. Because on the trial of said cases it was the belief of the attorneys for both parties that Exhibit "1," known as the printed record in the Rate Case, contained all of the original record as appealed from the Circuit Court for the County of Wayne to the Supreme Court of the State of Michigan, such appealed case being reported in 171 Mich. 335.

That on the trial of the case of Frank W. Gilchrist Estate vs. Detroit & Mackinac Ry. Co. in the Circuit Court for the County of Alpena (being a case like the said cases above entitled with but few exceptions) it developed from the introduction of the original files of the case so appealed to the supreme court, that said printed record did not contain all of such files and records; that on the introduction of such original files certain facts relating thereto were established by the testimony of Mr. James McNamara, attorney for defendant, a copy of which said testimony with such explanation and such files being hereto annexed and made a part of this motion. That because of the misunderstanding on the part of all of the attorneys on the trial of said cases in Bay City, and by reason of the discovery of such evidence which is material and necessary in support of the defense
made by defendant in such cases, such judgment should be
143 set aside and defendant should be granted a new trial.

This motion is based upon the files and records in this cause, upon the testimony taken therein and upon the testimony given by James McNamara in the trial of the case of Frank W. Gilchrist Estate, plaintiff, vs. Detroit & Mackinac Railway Company, in the Alpena Circuit Court, on the 9th day of January, 1917, a copy of which testimony with the files and records introduced in said cause in connection with this testimony, being hereto annexed and made a part of this motion. Also upon the affidavit of A. H. Briggs, official stenographer for the Circuit Court of Alpena County, hereto annexed and made a part of this motion.

Respectfully submitted,

JAMES McNAMARA,
HENRY & HENRY.
*Attorneys for Defendant.*

Dated this 22d day of January, 1917.

### *Testimony of James McNamara.*

Given in Gilchrist Refund Case, January 8, 1917, Alpena, Michigan.

JAMES MCNAMARA sworn for Defendant, examined by Charles R. Henry, testified:

I am a practicing attorney and reside at Detroit, Michigan, and am one of the counsel for the Detroit & Mackinac Railway Co.

I have had charge of the litigation in the so called rate Case from its inception to the present time.

Q. I show you a package of files here in the Rate Case and
144 ask you to designate what they are?

A. This is the enrolled record of the case of Detroit & Mackinac Railway Co. vs. The Michigan Railroad Commission, Wayne Circuit Court file No. 35866, Supreme Court file No. 24650 and is the record in the Supreme Court of the so-called Rate Case that we are talking about.

The last page is a certificate made by the Register in chancery of Wayne County to the effect that these papers are the original bill, process, answer, replication and all other pleading, processes, motions, notices, orders and decrees in said cause, with the original testimony taken before a commissioner, also copy of all journal and calendar entries.

I obtained these papers from the clerk of the Supreme Court. He sent them to the Wayne Circuit Court and I obtained permission from presiding Judge Hosmer of that court to bring them here for the purposes of this litigation.

Q. What is the practice in Wayne circuit as to issuing injunctions and making orders for them?

A. All injunctions in the Wayne Circuit Court are issued by the order of the presiding judge in chancery; when he makes such order it is taken to the county clerk and all injunctions that are made out by the county clerk are entitled in the name of the presiding judge over all divisions of court, and then the stamp is placed upon the injunction showing by whose order it was issued, although given in the name of the presiding circuit judge. At the time this injunction was issued Judge Hosmer was presiding judge.

Q. State briefly such facts which do not appear of record relative to obtaining the order before Judge Mandell.

145 A. After the preparing of the bill of complaint I attached to it the order to show cause which is signed here by Judge Mandell and dated the 20th day of November, 1909, which was made returnable November 24, 1909, at nine thirty A. M. It is signed by Judge Mandell himself, under his signature "Circuit Judge presiding in chancery division of Wayne Circuit Court." He was the only one that could issue such an order at that time.

On the 24th of November I appeared in court and told Judge Mandell what I was there for. He asked if I had served a copy of the bill of complaint. I told him I had and read to him my certificate of service, showing that I had served it myself upon Samuel H. Kelly, secretary of the Michigan Railroad Commission, within the time named in the order to show cause.

He said he was very loath*e* to issue an injunction in the matter without having some one from the Attorney General's office present. I then called his attention to the fact that we only had twenty days under the statute within which to perfect our appeal, and that I was afraid I would lose my rights under the statute if I did not have my injunction within that time. That while I had no objections to giving the Attorney General's office all the time they wanted, that I ought to have and should have and must have an injunction on that day in order to preserve my rights in the matter.

So he said, "All right, you draw up the order." I sat down at the desk in the court room and this order is in my own handwriting and on a legal sheet of paper as I drew it up. Meantime Judge Mandell telephoned the attorney general's office, obtained Mr. McGill on the phone, who said that he would be in court on the 27th.

So Judge Mandell in his own handwriting added to my
146 *my* writing, where I had it—added there that:

"Said injunction to continue in full force and effect until the hearing on the said order to show cause on Saturday, Nov. 27, 1909, and until the further order of this court."

The order reads as follows:

"No. 35866.

Detroit & Mackinac Railway Company, Complainant,

vs.

Michigan Railroad Commission, Defendant.

At a Session of the Circuit Court for Wayne County, Chancery Division, held at the County Building, in the City of Detroit, Michigan, on Wednesday, the 24th Day of November, A. D. 1909.

Present, Hon. Henry A. Mandell, circuit judge.

On reading the bill of complaint heretofore filed in this cause, and on reading and filing due proof of service of a copy of said bill of complaint and the order to show cause attached thereto on the Michigan Railroad Commission, wherein said Michigan Railroad Commission was ordered to show cause in this court on Wednesday, the 24th day of November, A. D. 1909, at 9:30 o'clock in the forenoon of said day, why an injunction should not issue as prayed for in complainant's bill of complaint; and after hearing James McNamara, solicitor for complainant, said defendant failing to appear, it is ordered by the court now here that a temporary injunction issue as prayed for in complainant's bill of complaint."

Now added to that in the handwriting of Judge Mandell is the following:

"Said injunction to continue in full force and effect until the hearing on said order to show cause on Saturday, November 27,
147 1909, and until the further order of the court.

Dated, November 24, 1909.

HENRY A. MANDELL,
*Circuit Judge.*"

I took that order down to the county clerk's office and filed it there and on the back of it it shows the filing: "Filed Nov. 24, 1909. George Humbert, deputy clerk. Entered No. 27, page 106." Initials "Z. C. B." Then under that is a stamp "Compared," and the initials "H. A. C."

After that order was filed I asked for the injunction, and they handed me a blank injunction and I sat down in the clerk's office and made it out myself on that blank.

This injunction contained, of course, the name of Geo. S. Hosmer, at that time presiding over all courts in Detroit, and was dated November 24, that same day.

I took the order right down to the clerk's office and drew it up myself. Then the clerk stamped on that with a stamp in green ink, "This injunction is issued on order of Judge Mandell."

That is the usual procedure there. Of course, it was Judge Mandell that gave the order. I interviewed the clerk last week, John Russell Fisher. He put that stamp on and remembers all the circumstances in connection with it, and told me that was the regular order and the method of procedure in the clerk's office after you got your order. The injunction itself reads as follows:

"STATE OF MICHIGAN:

"The Circuit Court for the County of Wayne. In Chancery.

"To the Michigan Railroad Commission and to its counsellors, attorneys, solicitors, and agents and each and every of them, greeting:

148 "Whereas, it has been represented to us, in the circuit court for the county of ——, in chancery, on the part of Detroit & Mackinac Railway Company, that it has lately exhibited its bill of complaint against you, the said Michigan Railroad Commission, defendant, to be relieved, touching the matters therein complained of; in which bill it is stated amongst other things that you are combining and confederating with others to injure the said complainant touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience; we, therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command you, the said Michigan Railroad Commission, and the persons be-

fore mentioned, and each and every of you, under penalty of ten thousand dollars, to be levied on your lands, goods and chattels, to our use, that you do absolutely desist and refrain from putting into operation or making effective, three orders of said Michigan Railroad Commission directed to the Detroit & Mackinac Railway Company, said complainant, dated respectively October 22nd, 1909, October 19th, 1909, and October 19th, 1909, shown and set forth in complainant's bill of complaint as Exhibits one (1), two (2) and three (3), which said orders undertake to make a new tariff for the transportation of logs in carload lots to the city of Alpena over the Detroit & Mackinac Railway Company, other than the ones now in force and effect on said complainant's railroad, until the further order of this court.

"Witness the Honorable George S. Hosmer, circuit judge, and the seal of said circuit court of Detroit, Michigan, this 24th day of November, A. D. 1909.

THOMAS F. FARRELL, *Register,*
"By GEORGE HUMBERT,
*Deputy Register.*

149 "JAMES McNAMARA,
*"Solicitor for Complainant.*

"1233 Majestic Building, Detroit, Michigan."

Entitled on the back, this injunction is "No. 35,866. The circuit court for the county of Wayne, in chancery. Detroit & Mackinac Railway Company, complainant, vs. Michigan Railroad Commission, defendant. Injunction." And across is in a big stamp, it says "Entered." And then it is stamped, "Filed, December 3rd, 1909. John R. Fisher, deputy clerk." And under that, "James McNamara, solicitor for complainant." And then with a green stamp, "This injunction is issued on order of Judge Mandell."

Mr. Henry: Your honor, we offer the order of Judge Mandell, the one read before this injunction, in evidence, and will have it identified as Exhibit 1.

The Court: Yes.

Mr. McNamara: After this injunction was issued I sent it down to the sheriff of Ingham county at Lansing, and told him to serve it upon some member of the Railroad Commission or the secretary of the Railroad Commission, and on the back of this injunction is the following:

"State of Michigan,
*County of Ingham, ss:*

"I hereby certify and return that on the second day of December, A. D. 1909, at the city of Lansing, I served the within writ of injunction on Samuel H. Kelley, secretary of the Michigan Railroad Commission, named therein, personally, by then and there showing to the said Samuel H. Kelley, secretary of the Michigan Railroad

Commission, the said injunction, with the seal impressed thereon, and delivered to him a true copy thereof.

150 "(Signed) O. L. LATHROP,
*Deputy Sheriff for Ingham County.*

"My fees, $2.50."

Mr. Henry: May the order be received, your honor, in evidence?

The Court: The order is received as Exhibit 1.

Mr. Henry: I offer the injunction with the other matters read by the witness in evidence and for identification have it indicated as Exhibit 2.

The Court: Yes.

Mr. Clark: No objection.

Mr. Henry: May it be understood as these are the original files that copies may be substituted?

Mr. Clark: Yes, make copies from these. He has read them into the record, anyway.

The Court: I notice some slight discrepancies between——

Mr. Clark: There are. I was just looking at this to see if that was a copy or not. It is not. The date October 19 is in here twice. November 3 isn't here.

A. Yes.

The Court: That is what I intended to call attention to.

Mr. McNamara: Yes.

The Court: The other discrepancies are of no consequence.

151 A. But it identifies them further by Exhibits 1, 2 and 3.

Mr. Clark: I have no objection to the reception of these documents and no objection to having copies in the record. I think that they should be copied from these documents that have been produced however, and not from the printed copy.

Q. Turn to the stipulation that you have referred to, the stipulation of Judge Bird. Have you the stipulation?

A. I have.

Q. I think you stated pretty fully how that came about. I wish you would state before you read that, just how Judge Bird came to sign it?

A. On the 27th of November, 1909, Mr. Charles W. McGill came to Wayne circuit court, appeared there before Judge Mandell and stated to Judge Mandell that Mr. Bird, the attorney general, was at Washington, and had not returned yet; and that he was very anxious to have him appear in the case in opposition to this injunction; and Judge Mandell asked him when he would return. He told him that he thought he would be there on the 2nd; and I am not certain now what day of the week the 2nd of December, 1909, was on, but anyway the matter was held open until that day for Judge Bird to appear to oppose this injunction, if he desired to do so.

On the morning of the 2nd of December, Judge Bird came to my office and asked me what the case was about; and I sat down with him and went over the case and told him all about it; told him what had been done.

He was very familiar with what had been done, but he wanted to know something about the merits of the case, and I told him. And he said that so far as he was concerned he would not appear against the injunction that was issued in the case and that I 152 could draw up a stipulation to that effect continuing that injunction in full force and effect until this case was finally disposed of on its merits in the courts, and I called my stenographer and I dictated that stipulation in the presence of Judge Bird and we both signed it.

The stipulation reads as follows:

"STATE OF MICHIGAN:

The Circuit Court for the County of Wayne. In Chancery.

No. 35866.

"THE DETROIT & MACKINAC RAILWAY COMPANY, Complainant,

vs.

MICHIGAN RAILROAD COMMISSION, Defendant.

"It is hereby stipulated by and between the attorneys for the respective parties hereto, that the application for an injunction and the order to show cause made by said court, and the hearing thereon, may be and is hereby continued in its present state, until the final determination of said cause upon the merits thereof.

"(Signed) "JOHN E. BIRD,
*"Attorney General.*
"JAMES McNAMARA,
*"Attorney for the Plaintiff.*

"Dated this 2nd day of December, A. D. 1909."

I took that over to the court and showed it to Judge Mandell and told him that there would be no hearing on that matter; it was all settled; and I took it down and filed it in the county clerk's office. And it contains on the back of it: "No. 35866, Wayne Circuit Court, Chancery, Liber No. 9, page 420. Detroit & Mackinac Railway Co. vs. Michigan Railroad Commission. Stipulation continuing present injunction in its present status until hearing on the merits. Filed December 3rd, 1909. John R. Fisher, deputy clerk. James McNamara, solicitor for complainant."

153 Q. Mr. McNamara, will you please submit the signature to the court?

The Court: I don't doubt it.

Mr. Clark: We don't question them.

Mr. Henry: That is the first time it ever appeared. You don't care to see it?

Mr. Clark: No.

Mr. Henry: Then, your honor, we offer this stipulation in evidence, Exhibit 3.

Mr. Clark: No objection.

(Witness continues.)

At the time I was talking this matter over with Judge Bird and determining upon the stipulation to be entered into, I had had to that date the exclusive management of this rate case for the defendant, and Attorney General Bird had the management of the case and appeared for the commission.

Q. I ask you to state in the discussion with Attorney General Bird at that time, whether it was expressed that the intent of the injunction and stipulation was to prevent the rate of the commission from going into effect until the determination of the case in the courts, and would not date back from that time?

Mr. Clark: I object to that as seeking to vary or supplement a written document by parole evidence, and incompetent.

Mr. Henry: He had the management of it; it would be
154 like two parties; and they discussed it; it might throw some
light on some latent ambiguity.

The Court: You may take it, anyway.

Mr. Clark: An exception.

A. We went over the case thoroughly and Judge Bird said that if the Michigan Railroad Commission was going to reduce any rates or start reducing rates in this state, he did not propose to have them started on the D. & M. Railroad Company, a small road; and he seemed to be quite familiar with the railroad; and it was understood that that stipulation would suspend the putting of these orders into effect by the Railroad Commission, making them effective in any way, until this case was finally heard upon its merits, and that the Railroad Company should collect its present rate, and the tariff should remain in full force and effect until this case was finally disposed of on its merits, and I had a talk with Judge Bird about that afterwards.

I prepared the bill of complaint in the Wayne Circuit Court.

Mr. Henry: I am now indicating the prayer for relief in the bill of complaint on page 141 and I ask you to look at it, Mr. McNamara, and see if that is the prayer for relief and prayer for process in the bill of complaint.

A. It is. The dates are correctly named as to the order. The dates in the injunction are evidently errors on my part, as I drafted it down at the office of the county clerk, and I evidently repeated October 19, but I fairly indicated *that* I meant by referring to the exhibits in the bill of complaint as 1, 2 and 3. That is the way they
were numbered in the bill of complaint.

155 The Court: Well, there is another mistake in the bill, itself,
isn't there, Mr. McNamara, in the prayer for relief?

Paragraph 3 of the prayer for relief "That the rate fixed by the orders of the Michigan Railroad Commission of October 22, 1909, November 3, 1909, and October 19, 1909?"

A. Yes.

The Court: How are those; are those correct?

A. I think they are.

The Court: How about the order of November 6?

A. Well, that is the time that the order was served upon the D. & M. railroad, that wasn't the time it was dated.

The Court: November 6 is the date of service of the order of November 3?

A. Yes. That is it. The order of November 3 was served upon the D. & M. Railroad upon November 6.

Mr. Clark: This prayer for relief that you are looking at here is the amended prayer. It wasn't filed until the 25th of May, 1910, some six months later than the original prayer?

A. The original prayer is there isn't it?

Mr. Clark: The original prayer is here. It is not in the printed record at all, but it is in the record of the court.

Q. Will you refer to the prayer that asks for an injunction?

A. Well that is the original prayer for relief, yes. That is what I now have before me. It reads as follows:

"The premises being considered, may it please the Court to grant unto this complainant the following relief:

156 (*a*) That a temporary injunction be issued out of and under the seal of this Honorable Court, directed to the Michigan Railroad Commission, the defendant herein, restraining and strictly enjoining said Commission from enforcing each and all of the three orders heretofore made by said Commission, reducing the freight rates and switching charges of said complainant on its railroad as set forth in Exhibits 1, 2 and 3.

(*b*) That the action of said Michigan Railroad Commission in reducing the freight rates and switching charges on complainant's railroad as set forth in Exhibits 1, 2 and 3 be set aside and held for naught, and that the rates heretofore fixed and published by said complainant in its M. R. C., No. 205, and its M. R. C. No. 208, and its M. R. C. No. 217, be restored by this Court upon a full hearing of the proofs and allegations of said complainant herein.

(*c*) That after a full hearing on the matters and facts contained in this Bill of Complaint such injunction be made perpetual and permanent.

(*d*) That the defendant, the Michigan Railroad Commission, be required to appear and answer this Bill of Complaint, but not under oath (his answer under oath being expressly waived.)

(*e*) That this complainant have such other and further relief in the premises as shall be agreeable to equity and good conscience.

May it please the Court, to grant unto this complainant a writ of injunction to be issued out of and under the seal of this Honorable Court, directed to the Michigan Railroad Commission, the defendant herein, restraining and strictly enjoining it, and each of the officers and members of said Commission, from enforcing the orders heretofore made by said Commission, as herein set forth."

157 A. Counsel has put in some tariff rates here. I am not sure that the so-called shipment discrimination rate was put in; have you it handy there?

A. It is, yes. It was known as the one against which the complaint made by the complainant in his case was lodged, was known as its M. R. C. No. 275. It was corrected by a new tariff that equalized the rates between points north of Alpena and south of Cheboygan into Cheboygan, and those south of Cheboygan and north of Alpena into Alpena by tariff known as M. R. C. No. 277 which became effective and was on file in the office of the Mich. Railroad Commission on the 1st day of June, 1909. Now those exhibits are contained in this record; and if they are not there, in my brief. I understood you introduced all those in evidence, didn't you?

**Mr. Clark**: No, we did not in this case. We will consent to have you use the copies you have there. We don't think the exhibits are material. We object to them on that ground. If they are material in any form, we consent to their use in that form.

The Court: Will you make an exhibit of them, Mr. Henry?

Mr. Henry: I think I will of the Cheboygan.

The Court: It will be No. 4.

A. M. R. C. No. 205 is already in evidence.

The Court: That is in evidence and so is 208. You are seeking now 275.

A. Now, I have got those numbers wrong. I will introduce them.
On page 61 of my brief in the Rate Case, Cheboygan rate was
158 known as M. R. C. No. 199 which became effective on January 15, 1909, the rate that was complained of as being unequal. Now I can read that rate into the record. Rates per 1,000 feet.

| | Per thousand. |
|---|---|
| From Aloha, Michigan to Cheboygan | $1.80 |
| From Bunton, Michigan to Cheboygan | 2.00 |
| From Black Lake Quarry (Black Lake Branch) | 1.80 |
| From Case | 2.00 |
| From Clark's Mill (Cleveland Branch) | 1.80 |
| From End of Wolverine Branch | 1.80 |
| From Gilchrist Spur (Lough Branch) | 1.80 |
| From Hurst, (Hurst Branch) | 2.00 |
| From La Rocque | 2.00 |
| From Le Grand | 1.80 |
| From Martindale Spur, (Tubbs Branch) | 2.00 |
| From Millersburg | 2.00 |
| From Mill Spur, (Indian River Branch) | 1.80 |
| From Tower | 1.80 |
| From Waveland | 1.80 |

Opposite the names Black Lake Quarry and in the cases at Clark's Mill, End of Wolverine Branch, Gilchrist Spur, Hurst Branch, Le Grand, Martindale's Spur, Mill Spur and Indian River Branch are stars, and below opposite the star it says: "No regular train service. Shipments from these points handled at our convenience only." And the further note: "Issued on less than statutory notice by authority of the Michigan Railroad Commission, Special permission No. 72, Jan. 11th, 1909."

A. That same tariff is to be found on page 454 of the printed record in the rate case, that is known as Exhibit "W," I think, Complainant's Exhibit "W."

That is No. 199.

The next one; on the 20th of May, 1909, the Detroit &
159 Mackinac Railway Company published the following rate to
Cheboygan to take the place of M. R. C. 199, to be known as
M. R. C. 237 which became effective June 1, 1909 and is known as
local Freight Tariff on Logs, all kinds, carloads, Minimum 2,500 feet
per Car, to Cheboygan, Michigan, from the following points:

The Court: Could you tell us what page in the record that is on?

Mr. McNamara: That is not in the record. It is in my brief on page 62. I am going to leave a copy of this here with you. (M. R. C. 237.)

| | |
|---|---|
| From Aloha, Michigan | $3.00 |
| From Black Lake Quarry, (Black Lake Branch) | 3.00 |
| From Bolton | 3.25 |
| From Bunton | 3.00 |
| From Case | 3.00 |
| From Cathro | 3.25 |
| From Clark's Mill, (Cleveland Branch) | 3.00 |
| From End of Dog Lake Branch | 3.00 |
| From End of Kimball Branch | 3.25 |
| From End of Wolverine Branch | 3.00 |
| From Gilchrist Spur (Lough Branch) | 3.00 |
| From Hurst, (Hurst Branch) | 3.25 |
| From La Rocque | 3.25 |
| From Le Grand | 3.00 |
| From Martindale's Spur, (Tubbs Branch) | 3.25 |
| From Metz | 3.25 |
| From Millersburg | 3.00 |
| From Mills Spur (Indian River Branch) | 3.00 |
| From Onaway | 3.00 |
| From Polaski | 3.25 |
| From Posen | 3.25 |

160

| | |
|---|---|
| From Tower | 3.00 |
| From Waveland | 3.00 |

A. These are notes, now:

"The rates from intermediate points will be the same as the rates from the next more distant point from which rates are named.

"A refund of fifty (50) cents per thousand feet on logs will be made when an equal amount of manufactured product is shipped out via the Detroit & Mackinac Railway.

No regular train service. Shipments from these points handled at our convenience only.

Issued May 20, 1909. Effective, June 1, 1909."

Q. Mr. McNamara, by the order of Judge Mandell which we have marked Exhibit 1, it was stated that the temporary injunction should remain in force until the 27th day of November and until the further order of the court. I ask you what, if anything, took place at the hearing of the 27th?

A. The stipulation between Attorney General Bird and myself.

Q. What, if anything, was ever done, other than has been put in evidence in this case to modify, change, or in any way affect Judge Mandell's order, Exhibit "1," or the injunction, Exhibit "2"?

A. Nothing at all. Of course, a mandamus was issued by the Supreme Court. I think that was on the 25th of June, 1912. Up until that time nothing was done to disturb the status of those orders or papers.

Cross-examination.

By Mr. Clark:

161 Q. I notice the date of service of this injunction at Lansing was exactly the same as the stipulation between you and Judge Bird at Detroit. I assume from that fact that Judge Bird did not have first hand knowledge that that injunction was being served in Lansing on that day. Do you remember whether you told him?

A. Yes, I had a copy of it there and showed it to him.

Q. Can you explain why the stipulation says nothing about the injunction, but refers merely to the order to show cause and the hearing on it?

A. Well, the order to show cause was to be heard on the 27th and it was not heard on the 27th. It was adjourned until Saturday the 2d, and it was supposed that at that time we would have a hearing on that order to show cause and the injunction that had been issued under it, with the presence of Judge Bird; but instead he entered into that stipulation with me and I took that over to Judge Mandell and told him that there would be no hearing—further hearing—and that the injunction would stand and I filed that stipulation.

Q. Was there any other reason other than as stated in that answer, why that stipulation referred to the order to show cause and the hearing thereon, and did not refer to the injunction itself?

A. No; it was supposed to refer to the status of affairs that existed just then, up to that time; the order to show cause and injunction was issued at that time.

Redirect examination.

By Mr. Henry:

Did anything take place after Judge Murfin made his decree?

A. Yes; I wanted to call the court's attention to that; that when the decree was prepared in this case by Messrs. Clark & Gillett and presented to Judge Murfin for his signature, Judge Murfin 162 handed it to me and asked me if I had any objection to it. I have it here. I want to show it to the court. And I said I did; that my objection was—that Judge Bird had a stipulation with me that the injunction that had been issued preventing the Railroad Commission from enforcing or making effective these orders, ran to final disposition of this case on its merits. That we had given notice of an appeal and the case was going to the Supreme Court, and that I did not think that he had any right to dissolve the injunction in this case; and I produced the stipulation and the injunction and order to show cause, and he asked Mr. Gillett what he thought about that and Mr. Gillett examined them and said "Well, he thought that the ordinary procedure was that the injunction would be dissolved with the dismissing of the bill of complaint. And Judge Murfin said, "I don't think that I have any authority whatever to dissolve that injunction under that stipulation" and he struck out from the order handed to him by Mr. Gillett, that part of it that was in there.

Q. You may read the latter — of the decree including the part struck out, and you are now reading from the files?

A. I am now reading from the original decree in this case, dated the 11th day of February, 1911. The decree, the last paragraph of it as submitted by Messrs. Gillett & Clark for the signature of the court reads as follows:

"Ordered, adjudged and decreed that the bill of complaint as well as the amended bill of complaint filed in this cause be and the same are hereby dismissed with costs to be taxed and that the temporary injunction iss*ude* in this cause be and the same is hereby dissolved."

A. After the discussion that I have just testified to, Judge Murfin took his pen and struck out the following words: "And that 163 the temporary injunction issued in this cause be and the same is hereby dissolved."

Q. They are not stricken out so but what we can see them, just one pen line run through the words?

A. Yes.

Q. Are the attorneys indicated in the decree?

A. Yes. This has a back. The back of this decree is No. 35,866. I know it is in the handwriting of Mr. Gillett; I am familiar enough with his handwriting to say that is his own handwriting on the back. It says:

"The Circuit Court for the County of Wayne, In Chancery. Detroit & Mackinac Railway Co. et al., Complainants, vs. Michigan Railroad Commission et al., defendants. Decree. Compared." After that is stamped on there "H. C. C." and under "compared" "J. A. S." with the stamp "Entered." It is indorsed "Filed February 11, 1911, John A. Seeley, Deputy."

John A. Seeley at that time was the court's deputy—Judge Murfin's deputy in court. He was also a deputy County Clerk. And on the bottom of it and printed, "Gillett & Clark," Shearer Building, Bay City, Mich."

That is on their manuscript cover.

Mr. Henry: We offer that in evidence as Exhibit 5.

After the decree was signed, or before it was signed and after Judge Murfin's opinion, what steps were taken by the defendant for a rehearing?

A. We made a motion before Judge Murfin for a rehearing of the case and Judge Murfin did not care to hear it because he said,——

Q. I would like to have you read into the record what Judge Murfin said in not hearing the rehearing?

164 Mr. Clark: This is immaterial. We object to it on that ground. I do not see how it can be prejudicial; it is immaterial, nevertheless.

The Court: Well read it.

A. On page 789 in the record of the Rate Case, the following proceedings are shown, dated,

"Saturday, February 11, 1911."

A. That was the day that the motion for a rehearing that we had previously made was returnable. (Reads:)

Mr. Baker: The primary purpose of making this motion is to put upon the record an objection to the decree of the court.

The way you construe and enforce this statute it violates the constitution of the United States, and in order to get that upon the record in the trial court, as I am bound to do, under the decisions of the Supreme Court of the United States, we make this motion for rehearing. If it had not been for that, we probably would not have made one. I want to present that question to the court, because I think when you consider the cases that bear upon the subject, you will set aside the decree; you will not grant the decree you have ordered.

The Court: I have studied this case very carefully before disposing of it. I do not want to be at all abrupt in the matter, but, in view of the fact that I am simply a nisi prius court, in view of the fact that the supreme Court of the United States will ultimately have to review this case, I do not believe I will hear your application. I will simply deny it as a matter of form, because I do not believe that a reconsideration of this case—I do not like to be stubborn 165 about it,—but I do not believe a reconsideration of this case would be profitable to anybody. Not that I am shirking the work, because I like it, but, not being a court of last resort, it does not seem to me that my conclusions, as a matter of fact, amount to anything except a gratification in my conscience in having done my duty the best I can, and, it seems to me, you will be better off if I deny your motion, and this is expedited rather than delayed by a reconsideration by the Court.

Mr. Baker: There is something to be said in favor of that. But, at the same time it is the duty I apprehend of the trial Court to reopen the subject and dispose of the case according to the best judgment of the Court.

The Court: Well, I have tried to do that.

(The court reads the motion.)

Mr. Baker: I claim the right to be heard here on this application for rehearing.

The Court: This is filed, Mr. Baker, and your record is preserved, and I will deny the application for rehearing. I will hear you gentlemen upon the proposed decree. If you have been able to agree upon it, I will be very much relieved.

The decree was then settled and signed.

I was present at that time and he did not hear either Mr. Baker or myself.

Mr. Henry: May it please the Court, while we may differ as to the materiality of these pleadings, in view of the fact that Mr. Clark has put in this case here the complaints upon which the orders by the Railroad Commission were made, the orders bearing date,
October 19, October 22 and November 3, 1909, we would ask
166 the privilege of putting in the answers which were made to
the complaints. You see these complaints were filed before the Railroad Commission. Mr. Clark has read the complaints. Then the railroad made answer—made reply to them and then a hearing was had, and in order to get the full matter in, if it is material at all, we offer the answers to those complaints.

The Court: That would be the answers of the railroad company, not to any bill of complaints, but to the complaints, upon which the orders were finally made?

Mr. Henry: The complaint is on pages 18, 19 and 20 of the printed record of the Rate Case, and the answer commences on page 21.

Mr. Henry: In view of the fact that other complaints are made here upon which the orders have been read into the record, we offer the complaint in case numbered 1 on pages 1, 2, 3, and 4 of the printed record; and the answer thereto on pages 4, 5, 6, 7 and 8.

Also the complaint numbered 2 of Fletcher Paper Company vs. The Detroit & Mackinac Railway Company on pages 9, 10 and 11, and the answer thereto on pages 11, 12, 13, 14 and 15.

Mr. Clark: We object to the proceedings in any other complaint than this as immaterial.

The Court: I think I will receive them.

Mr. Clark: It is understood in this court that on an objection being overruled, the stenographer enters an exception as a matter of course, Your Honor?

The Court: Not, it is not, because that would be right in
167 the teeth of the law. By the Judicature Act exceptions are
abolished.

Q. After the decision rendered in 171 Mich. 335, what was the next step which you took in these proceedings in the Rate Case?

A. I made application for a writ of error to the United States Supreme Court, and I went down to Lansing with it, and Judge Moore was chief justice at that time, and I gave the matter to Charles C. Hopkins, and he said the judges would be together the next day; that they had come to the conclusion that while the Chief Justice had ordinarily granted writs of error, that hereafter there would be a majority of the court that would consider them before they would be granted. The next day a majority of the Court or more gathered together in the consulting room and I went in there and presented the matter to them; and Justice Moore said that they were somewhat reluctant in granting the writ of error to the Supreme Court of the United States, unless I would agree to put these—have the railroad company put these orders into effect, and I discussed that matter with them. We had considerable discussion about that, and I gave them my reasons for not wishing to have the Railroad Company do that. So they said they would take the matter under consideration, and they were going to meet the next morning anyway, and if I would stay in town they would see me the next morning at 10 o'clock. So I went back there the next morning at 10 o'clock and the judges were present, and Justice Moore said that they had concluded to grant me a writ of error to the United States Supreme Court, if I would execute a bond for $100,000, and the bond run to the intervening defendants—or intervening complainants in the
case; in case that they prevailed in the United States Supreme
168 Court that we would pay them these rates and I told him
that that raised a very serious question. I did not believe that under the law they were entitled to have these rates, the difference between the Commission rates and this rate, bcause the rates had never become legal, operative or effective under the law of this State. And believing that, that I couldn't issue, or couldn't execute any such bond as that; I stood upon my legal rights. That if they did not care about issuing the writ of error, why, I denied their right to issue a writ of error coupled with a condition of that kind; and that they had never made an attempt to put these orders into effect they were not effective then, and I would not issue a bond to make effective certain orders that were not then in force and effect. So they handed me my papers back, and I turned the matter over to Mr. Baker. Mr. Baker was going up to Mackinac Island, and I understood he said that Judge Day was up there. The only thing I could tell about that is what Mr. Baker told me, if the court wants to hear it.

Judge Day refused the writ.

Mr. Clark: I would rather not have you go beyond the refusal of the writ, Mr. McNamara.

Q. One of the reasons why you refused to give a bond, as I understand you, was because of the condition which would do away with the injunction?
A. Exactly.

Mr. Clark: I will explain, Mr. McNamara, that my reason for objecting to your going further, is that you and I have always differed as to what the judge gave as his reasons, and possibly through a different understanding between the gentlemen who listened
169 to it; for that reason I would rather not have you put on the
record something that is not in my understanding. I don't question in the slightest degree your view of it.

A. I say frankly all I know about that proceeding, I said to Judge Emerick, is what Fred Baker told me.

Mr. Clark: I am willing to have the record show that it was denied by Judge Day.

Mr. Henry: The purpose of this and the application for the writ of error goes to two points, one the injunction, and the other, the good faith and diligence of the defendant in prosecuting the cases.

Q. After the demurrer in the refund case was overruled, what steps did you take then?

A. I demurred to the declaration in the refund case in Bay City.

Q. They raised the same point?

A. Yes; those demurrers were argued before Judge Collins and Judge Collins subsequently overruled my motion, and I prepared a writ of certiorari to the supreme court of this state and presented it to the supreme court of this state, and they did not care about hearing it. They said, because the whole matter could be brought up on a writ of error.

Q. Do you know of any other proceedings that have been taken or attempted in this case, as showing the diligence on the part of the defendant, or showing what they did do?

A. We have been as diligent as we could. We have been working all the while.

### *Hearing on Motion for New Trial.*

Pursuant to consent of counsel defendant's motion for new
170 trial was heard by Hon. Samuel G. Houghton as judge of
said court, on the 29th day of January, 1917, and after arguments had been made for and against the motion the following proceedings were had:

Mr. Henry: I would like to have it appear of record that counsel has fairly presented his objections to our motion, and that the court should further be advised of one or two things which are contained in the motion. At the time of the trial of this case the defendant made three motions; one was a motion to dismiss at the conclusion of the proofs; the other was a motion to permit the defendant to submit other and additional evidence; and that motion having been made by Mr. Fred A. Baker of Detroit, was read into the record. The motion to dismiss was not made in a formal way by any paper being filed, but Mr. McNamara made an elaborate opening at the conclusion of plaintiff's proofs, and at the conclusion of his opening he stated: "Upon the grounds contained in my statement or opening I move the court to dismiss." Mr. Baker then proceeded to further argue the motion to dismiss, and concluded his argument with a motion to dismiss that in the event the court did not grant the motion to dismiss that they put in further testimony relative to the condition of the defendant railroad, especially subsequent to the 15th of August, 1910, when the last proofs were taken which controlled the rates.

The other motion made was that the plaintiff elect whether it relied on the common law counts in its declaration, or whether *they* relied on the statutory count.

Now, in Judge Coumans' opinion he denied these motions, and when we were here on the 27th of November, counsel for plaintiff, Judge Coumans and ourselves deemed that a sufficient record 171 of the presentation of the motions, and of the disposition thereof by the court, without having a formal order entered in each of the three motions.

These are three of the grounds for the new trial: That the court should have dismissed the case at the conclusion of the proofs, and in event he did not dismiss the case at the conclusion of proofs, that we be permitted to present other and further testimony to the court, and that the court require the plaintiff to elect whether he relied upon the common law or statutory counts or upon both.

Now, your honor, in addition *that* that, and as one of our reasons for a new trial, I quoted Judge Coumans as follows:

"Now, it may be some advantage to the defendant in this case to have it appear of record that it would be utterly impossible for the court, with the limited time he can sit here as a court, to take this case and go through it and give satisfactory reasons and the various requests that have been made by the defendant, if he overrules them, and whatever is done has got to be done today, or not later than tomorrow, as the changed conditions here will make that necessary. The court will retire probably the day after tomorrow; I am not advised as to the exact time, but Judge Houghton told me a week ago, and the record can show that he succeeds me here as judge, that he would not qualify until the first of the month. I have been informed since that time that he is to qualify on the 29th of this month, so that I don't see how I could, even if inclined to do so, go into the matter any more elabor- — than as stated in the findings Mr. Clark has filed here to be adopted, if I adopt them, I think it is to the interest of everybody to close it up now and not be submitted to Judge Houghton or somebody afterwards, because it will 172 cause undoubtedly a lot of time and delay, and it seems to me that the court of last resort in this state will be able to protect the rights of the defendant fully, because you have your requests there covering, as I read it, every phase of the case known to me, and if they are denied you are square on your rights. To get the matter in the condition I think it should be in, I shall sign the findings as prepared by the plaintiff, with the addition of the 43rd and 44th requests, which are refused.

Mr. McNamara: As I understand your honor will enter an order denying all our requests. What we object to is the adopting the language of Mr. Clark in explanation of certain requests."

Now, while Mr. McNamara stated the understanding that the court adopted the language of Mr. Clark there was a great deal of other argument to the court, many more reasons advanced than the one suggested by counsel.

"The Court: Well, the court will say that while that is the langhage of Mr. Clark, I have gone over this and have had that paper before me for several days, and I will adopt that as my own language in the cause, and the additional findings that Mr. Clark asked for will be filed and allowed.

"Mr. McNamara: Then the other paper that Mr. Clark prepared with reference to our findings, I understand the court adopts that too?

"The Court: Yes, adopts that, and to make your record right we want to add that the 43rd and 44th requests are refused."

173 I merely read this to the court in connection with this more formal presentation of our motion to show the court that Judge Coumans appreciated the fact that it would be impossible for him to pass upon our findings specially.

I do not think that rule 45 nor the Judicature Act very materially changes the duty of the court in reference to applications for new trials, neither do I think it changes appreciably the duty of counsel in a case tried before a court to present their requests. Rule 45 reads this way: "Either party may present requests to the court before judgment at any time, and if so requested it becomes the duty of the court to pass specially on each of said requests."

Now, in this, our motion for a new trial, we insist that that was not done in this case; it was not done for the first reason that it was a physical impossibility for Judge Coumans to do it. I am willing to accept what counsel has stated here in reference to our amended motion for a new trial as conclusive upon that point, and I shall not urge that further.

The understanding, as I understand it, is that this testimony of Mr. McNamara's may go into the record in the five refund cases here in Bay City, the first being Calendar No. 10211, and the other four cases, the same as though it had been submitted before Judge Coumans at the time the other evidence was submitted.

Further, if I understand counsel right, this court may consider that testimony in connection with the other testimony in passing upon our motion for a new trial.

I ask the court now here to make a written finding of his disposition of this motion. I don't know what your honor's practice has been in that regard.

174 The Court: It has been the practice here as long as I can remember that if you ask the judge to give his reasons he has always done so, and usually does it whether he is asked or not.

Mr. Henry: Whether your honor could pass on those questions without hearing the case is a matter I would like to have you consider before making the written reasons.

Mr. Clark: I want the record to show that the statements taken down by the official stenographer were at the close of a longer argument in which both counsel had stated their views, especially in regard to granting a new trial, and I don't wish to repeat my argument on the record, but merely wish the record to show that there has been an argument and that your honor had heard the reasons from counsel for both sides as to why this new hearing should or should not be granted.

I also want the record to show as stated by counsel; we do consent that the newly discovered evidence, the testimony of Mr. McNamara as given in Alpena in the trial of the Gilchrist case, and the exhibits referred to by him, may go into this record as a part of the motion for a new trial, and may be considered as though presented to your honor on the making of such a motion, or even if presented to Judge Coumans on the making of the motion for a new trial, so the supreme court may with our consent take into consideration whether this new evidence is of any value or importance in its effect upon the merits of the case. Of course we cannot concede that it came before Judge Coumans on the hearing itself, because it did not, but so far as the supreme court is concerned they may consider it with our consent as bearing upon the decision of the case on its merits.

175 In respect to the so-called motion to elect, the record should show that after the request or motion was made by defendant to require plaintiffs to elect, etc., I stated, both verbally on the argument, and in my brief, that plaintiffs had no intention of supporting their case by any other evidence than proof of the fact that the rates charged by defendant exceeded the rates fixed by the Railroad Commission and confirmed by the courts, and were therefore illegal. That for this reason no evidence of the unreasonableness or reasonableness of the rates in themselves should be received in behalf of either party.

I further stated that I did not wish to mislead defendant's counsel, and would answer upon the record any question that might be asked in respect to plaintiff's theories and claims, but would not abandon any of the counts of the declaration merely because they might be broad enough to cover some other theory than the theory actually presented upon the hearing. I stated that the special counts of the declaration explained fully the foundation of the common counts.

I make that statement because the statements just referred to are not in the record anywhere, but were presented both to counsel and the court in our briefs, as a means of explaining our theories bearing on the motion to elect.

I think your honor should deny this motion for a new trial.

Mr. Henry: Counsel has gone into another matter, which we will present to the court now here.

On this motion for an election we filed a petition to that motion, and stated that it would be presented to the court; that no journal entries ever appeared in connection with any one of these

176 three motions. I have prepared journal entries however, and in the abundance of caution, if agreeable to the court, I should like to have all three motions treated as formal motions made and disposed of as they were disposed of by Judge Coumans.

The first motion and the language which I would like to have the court permit us to put in, an order denying the same, is as follows:

A motion having been heretofore made on the part of defendant in this cause that the plaintiffs elect which count in their declaration they rely on for the recovery of a judgment in this case, whether plaintiffs rely on their so called statutory count or upon their so called common law count in their declaration for such recovery, after hearing counsel for the respective parties, it is ordered that the said motion be and the same is hereby denied, without costs to either party.

We don't think that anything can be added now to the reasons for it. Counsel of course will present his brief, if the case goes to the Supreme Court, and his reasons there, but if the court please in view of the fact that we made a formal written petition and gave notice of hearing — would like the court to permit us to have this either made a journal entry or an order signed by the court, either as nunc pro tunc as of the 27th of November, 1916, or today, as shall please the court and the counsel.

In that connection I have prepared orders denying the motion to dismiss and denying the motion to submit further testimony, which I have hereinbefore referred to, and it is in the same language, merely that it is denied in each instance.

I think perhaps if your honor will permit me I will read it.

A motion having been made in this cause by and on behalf of defendant that the court permit defendant to submit 177 further evidence respecting the property of the defendant, its value, its earnings, its expenses, its depreciation, its total income, and other facts during the years ending June 30, 1910, 1911, 1912, 1913, 1914, 1915, down to February 18, 1915, as set forth in such motion which Mr. James McNamara and Mr. Fred A. Baker made at the conclusion of the proofs in this case; after hearing counsel for the respective parties it is ordered that the said motion be and the same is hereby denied without costs to either party.

The last motion is the one with reference to the dismissal and we ask the court to permit us to make a formal journal entry or that the court sign an order as follows:

A motion having been heretofore made on the part of defendant at the conclusion of the plaintiff's proofs that all proceedings had and taken therein be dismissed and that judgment be rendered in favor of defendant of no cause of action; after hearing counsel for the respective parties it is ordered that said motion be and the same is hereby denied, without costs.

Mr. Clark: I have no objection whatever to the orders, in fact I think I stated on the record that I would consent to the entry of any formal order that counsel wished to make the record complete.

Mr. Henry: How and when should these orders have been entered?

Mr. Clark: I don't know whether there is such a thing possible as a journal entry nunc pro tunc, the journal is made up every day. These are a mere formality in one sense of the word, they are to make the record complete, and I suppose they should go into 178 the proceedings of today in the ordinary course.

Whatever I stated here on the record is in full explanation of them.

The Court: I should think under the circumstances the Supreme Court would consider them as made when they were, although dated subsequently perhaps.

Mr. Clark: That is why I wanted to make the statement on the record on the motion to elect.

Mr. Henry said something about some things you still have in the motion, you would want the reasons set forth as though it would require some further argument and further study.

The Court: Well, I want to do anything I can to aid counsel in getting this matter squarely before the Supreme Court.

Mr. Henry: I don't think that could be done unless you granted the motion for a new trial. I mean by that that I don't think the court could give reasons that perhaps he would give if he heard the testimony.

The Court: Well, it seems to me as the case has been before the court a long time, and been before two judges, it could not profit very much at this time if a new trial were granted, and it would seem as though it had taken a great deal of time and expense to get the case in shape for the Supreme Court, and it having been passed upon largely by two courts, and the present court, knowing nothing of the case only as he has gained a little of it, if there was something perhaps that was omitted, and that seems not to be the case here, it would seem as though it were in as good shape to go 179 to the Supreme Court now as at any time. I think under the circumstances I will deny the motion, and I will take your motion and give it such attention as I can under the circumstances and set forth the reasons for the denial in each instance. Probably if I had more time and knowledge of the case there might be more intelligent reasons for the denial of the specific requests or reasons, but we will endeavor to do the best we can under the circumstances.

## *Decision on Motion for New Trial.*

(February 26th, 1917.)

This matter came on to be heard on a motion for a new trial in the above entitled cause and the other companion cases.

After considering the reasons given why a new trial *trial* should be granted the court being advised in the matter as fully as could be under the circumstances of the case, which has been pending for some considerable time and at different stages been before two other judges, and having reached the conclusion that the reasons for granting a new trial are not sufficient, the motion is hereby denied for the following reasons:

1. That the judgments were not unauthorized by act No. 300 of the Public Acts of 1909 and amendments thereto.

2. That the court did not err in overruling the motion made in each of said cases to dismiss said causes.

3. The three orders made by the Michigan Railroad Commission referred to in defendant's third reason for granting a new trial were not void and without force.

180 4. The court did not err in overruling the defendant's motion requiring plaintiff to elect whether they relied upon the act last referred to or the common law.

5. The court did not err in its construction of sections 10, 16, 18, 22, 25, and 26 of Act No. 300 of the Public Acts of 1909.

6. In considering the matters set forth in defendant's sixth reason for the granting of a new trial I am satisfied that the court reached a judicial determination of the matters submitted and referred to in said motion, and that the action of the court in this regard did not constitute an error nor prejudice the rights of defendant.

7. That the court did not err in a fuller compliance with Circuit Court rule 45 as set forth in defendant's seventh reason, as it appears from the record that the matters before it and specified in said seventh reason were judicially determined by it.

8. The court did not err in refusing to comply with the request of defendant's attorneys as pointed out in the eighth reason, since the findings of the court were sufficient for a proper determination of that element of the case.

9. The court did not err in his determination of the matter as pointed out in defendant's ninth reason, since it appears of record that he did pass judicially upon the numerous questions submitted by the defendant's attorneys.

181 10. As appears by the records in said cause the Circuit Court determined the questions involved, giving it such consideration as he considered sufficient, which resulted in a legal determination by it and against the contention of defendant, the record showing that the then Circuit Judge passed finally on each and all questions submitted for consideration.

11. Misunderstanding of attorneys on a trial is not necessarily a reason for granting a new trial, and in view of the time and labor put upon this case, is not sufficient to warrant the court at this time in granting a new trial. The newly discovered evidence was not so material as to operate as a mistrial or even a miscarriage of justice, and in consequence thereof is not sufficient to warrant this court in granting a new trial.

S. G. HOUGHTON,
*Circuit Judge.*

Dated February 26, 1917.

(Copy to Mr. Clark and Mr. Henry.)

### *Exceptions to Denial of Motion for New Trial.*

(Filed March 1, 1917.)

1. Defendant in the above entitled cause hereby excepts to the refusal of the Court to grant to defendant a new trial of said cause.

2. Said defendant expressly excepts to the first reason assigned by the court for his denial of defendant's motion for a new trial.

3. Said defendant hereby expressly excepts to the second reason assigned by the court for his denial of defendant's motion for a new trial.

182 4. Said defendant expressly excepts to the third reason assigned by the court for his denial of defendant's motion for a new trial.

5. Said defendant expressly excepts to the fourth reason assigned by the court for his denial of defendant's motion for a new trial.

6. Said defendant expressly excepts to the fifth reason assigned by the court for his denial of defendant's motion for a new trial.

7. Said defendant expressly excepts to the sixth reason assigned by the court for his denial of defendant's motion for a new trial.

8. Said defendant expressly excepts to the seventh reason assigned by the court for his denial of defendant's motion for a new trial.

9. Said defendant expressly excepts to the eighth reason assigned by the court for his denial of defendant's motion for a new trial.

10. Said defendant expressly excepts to the ninth reason assigned by the court for his denial of defendant's motion for a new trial.

11. Said defendant expressly excepts to the tenth reason assigned by the court for his denial of defendant's motion for a new trial.

12. Said defendant expressly excepts to the eleventh reason assigned by the court for his denial of defendant's motion for a new trial.

183 Dated, February 28th, 1917.

HENRY & HENRY,
*Attorneys for Defendant.*

To Gillett & Clark, Attorneys for Plaintiff.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

### *Plaintiff's Assignment of Errors.*

1. The court erred in denying plaintiff's motion to double plaintiff's entire damages aggregating $28,184.97.

2. The court erred in denying plaintiff's motion to double so much of plaintiff's damages as have accrued since July 22, 1912, viz: $14,303.95.

3. The court erred in denying plaintiff's motion to double so much of plaintiff's damages as have accrued since March 22, 1913, viz: $10,664.17.

4. The court erred in denying plaintiff's motion to double so much of plaintiff's damages as consists of the interest accrued on the sums paid by plaintiff in excess of the lawful charges, viz: the sum of $4,621.38.

184 5. The court erred in denying plaintiff's motion to double so much of plaintiff's damages as have accrued since July 25, 1914, viz: $1,173.74.

GILLETT & CLARK,
*Attorneys for Plaintiff.*

185 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

Cal. No. 10211.

RICHARDSON LUMBER COMPANY, Plaintiff,
vs.
DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

### *Assignments of Error.*

Now comes the Detroit & Mackinac Railway Company, defendant, by its attorneys, and alleges that in the record and proceedings in the cause above entitled there was and is manifest error in the following particulars:

1.

The court and judge thereof erred in overruling the demurrer made by the defendant to the declaration of the plaintiff and in making the order so overruling said demurrer as entered in said case July 7, 1915.

(R. 24, 30-32.)

2.

That Hon. Chester P. Collins, judge of said court, erred in his written opinion overruling such demurrer, such opinion being contained at length in the record.

(R. 24-30.)

3.

That said court and the judge thereof erred in stating *that* issues and facts upon which such opinion overruling said demurrer was predicated.

(R. 24-30.)

186 4.

That said court and the judge thereof erred in the opinion overruling said demurrer, wherein is stated amongst other things as follows:

"It plainly appears that this statute introduces new elements, circumstances and conditions in the relations between railroad companies and their shipper patrons, and that it gives to the patrons under certain conditions, rights and remedies not given by the common law."

This assignment of error is dependent upon the opinion later expressed by the court relative to the application of the statute and the common law to the issues involved.

(R. 26.)

5.

That the court and the judge thereof erred in such opinion wherein is stated amongst other things:

"It is fundamental and elementary that where a statute gives rights or remedies not theretofore given by the common law, such rights and remedies are to be considered as cumulative and not as abrogating the common law rights and remedies, unless the statute giving those remedies, either by express terms or by clear inference abrogates such common law rights and remedies."

This assignment of error must be considered in connection with the whole opinion.

(R. 26.)

6.

That the court and the judge thereof erred in that part of such opinion which reads as follows:

187 "From an examination of this statute, I fail to find any purpose of the legislature to take away from any shipper any right theretofore enjoyed by him. From such examination I find a well-defined purpose to give a shipper under certain conditions rights and remedies not theretofore enjoyed by him * * * The fixing of such rate is by an order of the commission and is prima facie lawful and reasonable until found otherwise, pursuant to a provision of Section 26, or modified under Section 24. This rate when settled by a court decision under the provisions of Section 26 becomes an adjudication and final, so that in a controversy thereafter between a shipper and the company, upon the point of the reasonableness or unreasonableness of the rate, the order so settled by the court is an adjudication, and one of the main objects of the bill is to produce this result."

This assignment is to be considered in connection with the opinion in its entirety.

(R. 27.)

### 7.

That the court and the judge thereof erred in such opinion wherein is stated the following:

"From a consideration of the whole act, it is my opinion that upon the point under consideration, the common law remedy of the shipper to sue for the excessive charges paid and recover the same in an action of assumpsit, is not taken away."

(R. 27.)

### 8.

The court and the judge thereof erred in such opinion wherein is stated as follows:

"Sections 40, 46 and 47 are referred to by counsel * * * It
may be that these provisions do not have the specific effect
188 of reserving said common law right to sue for excessive rate
freight payments, but they certainly do not contain either
separately or collectively any provision which opposes or tends to abrogate such right, and it appears to me that considering the effect of these three sections separately or together, they tend to show the legislative intention to preserve the common law right described.

(R. 28.)

### 9.

The court and the judge thereof in such opinion erred by stating:

"Referring specifically to the claim that paragraph (*g*) of Section 10 abrogates a common law remedy of the shipper, attention is called to the following elements of the act. Sections 22, 23, 24, 25, 26 and 27 provides machinery for making what might be termed a working program for future services as between a railroad company and a shipper. They providing for a full hearing, and a fixing of the future rates for commodities between given points; they provide a specific method for the review of that order, and its confirmation, modification or disaffirmance by a court. There is no provision made therein for the fixing of a rate for past excessive charges."

On the other hand Section 10 requires a railroad company to make and file and publish a tariff of rates which shall be in force for a certain time after publication. The rate fixed by this tariff is presumed to be reasonable until it is otherwise made to appear."

(R. 28.)

### 10.

That the court and the judge thereof erred in such opinion wherein is stated:

189 "As a part of the machinery of Section 10 it is provided by
Section 10 (*g*) that notwithstanding the fixing of the rate
by the company, and notwithstanding such rate is presumed to be reasonable and fair, and notwithstanding the freight so fixed has

been paid, that even then within six months after the delivery of any shipment of freight at destination, any shipper may attack the reasonableness of the rate he has before that recognized, before the commission. This attack is made through a hearing and determination of the commission as to whether the rate before that exacted was irregular or exorbitant, and as to what would have been a reasonable rate, and provides that if the reasonable rate is found to be less than the exacted rate, the railroad company should be required to refund, and permits a shipper in that case to sue for the excessive exacted amount before that paid by him, and in such suit the order of the railroad commission is treated as prima facie correct, but no railroad company sued under such conditions shall be liable for any penalty or forfeiture, etc."

(R. 29.)

11.

That the court and the judge thereof erred in such opinion wherein is stated:

"In my opinion paragraph (*g*) (Sec. 22) was intended to provide for cases and conditions which it was assumed — and in fact were not provided for by Section 22, and gives a remedy different from that provided by Section 22, and neither modifies, or in any way affects the provisions of Section 22 or the proceedings thereunder, or takes away any common law right of any shipper."

(R. 29.)

190 12.

That the court and the judge thereof erred in such opinion wherein is stated:

"I am of the opinion that the filing of a tariff by defendant was not a condition precedent to a suit for excess freight by the plaintiff, and that the failure of defendant to sooner file a tariff and comply with the order of the railroad commission has no effect whatever on plaintiff's right or remedy under the statute."

(R. 30.)

13.

That the court and the judge thereof erred in the opinion wherein is stated:

"I have carefully considered the point made against plaintiff's claim based on the interstate commerce act and the decisions of the supreme court of the United States construing the same.

"Without going into detail as to the reasons therefor, I am of the opinion that the conditions and circumstances and general purpose of the two acts, so far as this particular question is concerned, are so manifestly different that the United States supreme court decisions are not applicable to our statute. For the foregoing reasons the demurrer is overruled."

(R. 30.)

14.

That the court erred in his opinion, findings and conclusions as set forth in full in such opinion and that the foregoing assignments of error which do not cover the opinion in its entirety are not intended to except such parts of said opinion as are not quoted, but are to be considered in each instance in connection with the whole
191 opinion, error being assigned on the findings and opinions of the court on the various issues and questions treated and considered in such opinion, both separately and collectively.

(R. 24-30.)

15.

That the court erred in causing the order of July 7, 1915, to be made and entered in said cause, overruling said demurrer with costs to the plaintiff.

(R. 32.)

16.

That the court erred in overruling and denying the defendant's motion for change of venue in said cause, from the circuit court of Bay county to the circuit court of Alpena county.

(R. 31.)

17.

That the court erred by making an order on the 20th day of May, 1915, as follows:

"The motion of said defendant to dismiss the cause for want of jurisdiction, having come on to be heard, and after due deliberation, it is ordered that the same be and hereby is denied."

And that said court erred in not granting the defendant's motion to dismiss said cause pursuant to the reasons therein contained.

(R. 20.)

18.

That the court erred in making an order on the 20th day of May, 1915, in said court and cause, which said order and decision reads as follows:

"A motion having been heretofore made on the part of
192 the defendant in this cause that change of venue be granted by transferring said cause for trial to the circuit court for the county of Alpena. After hearing counsel for the respective parties, it is ordered that said motion be and the same is hereby denied, and that plaintiff is hereby awarded an attorney fee of ten dollars as costs of said motion to be taxed."

(R. 31.)

## 19.

That the court erred in not granting to the defendant the motion made in said cause for such change of venue.

(R. 21-23, 31.)

## 20.

That the court erred by receiving in evidence on the trial of said cause Exhibit 1-*j* set forth on pages 120 and 121 of Exhibit 1, said Exhibit 1 being the printed record in the so-called rate case. Such Exhibit 1-*j* being the order of the Michigan Railroad Commission of date October 19, 1909, relative to switching charges between Alpena and Broadwell's dam. Objection being made to such Exhibit 1, offered as follows:

"Mr. Henry: As to that we will make objection that it is not based on any legal complaint. That no complaint was ever made according to the terms of the statute, and therefore, the order is absolutely void.

Mr. McNamara: The further objection I think at this time, that these orders cannot be received here for the specific purpose of recovering in these proceedings, for the reason that they have elected their remedy under the common law, and they cannot introduce here the orders of the Railroad Commission for the purpose of recovering, that they did not comply with the Railroad Commission act
193 by applying to the Michigan Railroad Commission for reparation prior to the commencement of this suit; therefore, these orders are incompetent and immaterial in this case that we have now before us.

Mr. Henry: One further objection. They are void because they were never filed with the commission and never posted and published in accordance with law.

The Court: It may be received for the present.

The exhibit was retained as evidence by the court in the case.

(Fletcher Record 79.)

## 21.

The court erred by admitting in evidence Exhibit 1-k, being the order of the Railroad Commission of date October 22, 1909, appearing on pages 118 and 119 of the printed record in the Rate Case, relative to a tariff for the transportation of logs in carload lots to the City of Alpena, the same objection having been made thereto as designated in the last assignment of error.

(Fletcher R. 81.)

## 22.

That the court erred in receiving in evidence the order last above referred to, objection having been made thereto as follows:

"Mr. Baker: I object to that order on the ground that there was no complaint to the Michigan Railroad Commission that the rates to Alpena on logs were unjust, unreasonable and excessive, and that there was no hearing on any such allegation before the Railroad Commission, no evidence was introduced to show that the 194 rates to Alpena were unjust, unreasonable and excessive. The complaint in that case related exclusively to the discrimination in favor of shipments as against Alpena, and I insist that to sustain this order and grant the plaintiff "any relief on this order would be a violation of the due process of law — of the 14th amendment and of the same clause in our own State Constitution. I also make the objection that the provision in this order for a fifty cent refund was an improper rebate and discrimination in favor of the Fletcher Paper Company and is absolutely void, in and of itself a violation of the Michigan act. Our position in regard to that is that all shippers living in Alpena are entitled to the same rate, regardless of what they do with their products.

The Court: It may be received for the present."

The exhibit was retained in evidence by the court.

(Fletcher R. 81.)

23.

That the court erred in receiving and retaining in evidence Exhibit 1-l, being the order of the Michigan Railroad Commission, known as supplemental order of November 3, 1909, set forth on pages 121 and 123 of the printed record in the Rate Case. All objections heretofore made to the two preceding orders were made to receiving this exhibit in evidence; it being asserted and practically conceded that no hearing was had on the supplemental order, the same having been made on the Commission's own initiative.

(Fletcher R. 82-84.)

24.

That the court erred in receiving in evidence Exhibit 1-x being an order of the Michigan Railroad Commission, made November 15, 1910, set forth on pages 769 and 770 of the printed 195 record in the Rate Case. It being understood that the objections made to the orders hereinbefore referred to should apply to the admission of this exhibit.

(Fletcher R. 87-88.)

25.

That the court erred by his decision made on the 13th day of November, 1916, wherein he overruled and denied the motion made by and on behalf of the defendant to dismiss the plaintiff's action and direct a verdict in its behalf, as stated and set forth at length by Mr. McNamara at the conclusion of his statement of the defense, said motion to dismiss having been made at the time of the trial of the cause; the decision of the court having been reserved for consideration, and subsequently incorporated in his opinion of the date last named. Said motion and the reasons therefor being contained on pages 151 to 199 of the Fletcher record. The opinion and decision of said motion being contained on pages 206 to 212 of the Fletcher record.

(R. 75-81.)

26.

That the court erred in his opinion of date November 13, 1916, wherein he denied the motion made by Mr. Baker by and on behalf of the defendant, to dismiss the action of the plaintiff and direct a verdict in favor of the defendant. Said motion having been made on the trial of said cause, and the reasons stated therefor, being contained on page 198 to page 199 inclusive of the Fletcher record. The court having reserved its decision as to said motion, deciding the same as stated in the preceding assignment of error. 196

(R. 75-83.)

27.

That the court erred in deciding and finding that the rates fixed by the orders of October 22 and November 3, 1909, (Exhibits 1-K and 1-L) were in force before the judicial controversy was terminated by the granting of a writ of mandamus to the Supreme Court of Michigan, July 25, 1914, and because such decision was in violation of the due process of law and the equal protection of law clauses of the 14th amendment of the Constitution of the United States.

(R. 75-83.)

28.

That the court erred by its decision of November 13, 1916, wherein it overruled and denied the motion made on the trial of this cause by Mr. Baker, to submit further evidence relative to the property of the defendant railway company and its value, its earnings and conditions for specific years, and other things as set forth in such motion so made on said trial and contained on pages 199 to 203 inclusive of this record; such motion said court having taken under advisement and decided as stated herein on November 13, 1916.

(R. 75-83.)

29.

That the court erred in its findings of facts and conclusions of law as set forth at length in its opinion made and filed November 13, 1916, prior to the rendition of judgment in this cause.

(R. 75-83.)

197 30.

The court erred in its findings of fact of date November 13, 1916, in not indicating therein that the orders of the Railroad Commission involved in this suit of dates October 19, October 22 and November 3, 1909, were never posted and published as required by law, and were never filed with the Commission in pursuance of the statute, and that no complaints or petitions were ever made to the Railroad Commission authorizing the making of such orders, or that said orders did not contain the judgment of the Railroad Commission, and that the order known as Supplemental Order of date November 3, 1909, was made without any hearing and on the initiative of the Railroad Commission and was void and of no force.

(R. 75-83.)

31.

That the Court erred in its conclusions of law as contained in the opinion of November 13, 1916, wherein is stated:

"The right to recover excessive or illegal freight rates by an action of assumpsit existed at common law and has not been taken away by statute. The statute (Act 300 of 1909) gives additional rights and remedies, but creates no new form of action."

(R. 78.)

32.

That the court erred in its conclusions of law contained in said opinion wherein — stated:

"The new provisions for the protection of shippers are principally
found in sections 10 and 22 of the statute. These sections
198 apply to different circumstances. Proceedings under one or
the other of these sections may be selected to fit the circumstances. The result in each case is an order of the commission, and I find nothing in the statute to indicate that an order made under Section 22 is any less effective than an order made under Section 10. I therefore hold that plaintiff was not required to take any proceedings under Section 10 before commencing its action."

(R. 78.)

33.

That the court erred in its conclusions of law wherein in such opinion is stated:

"If the orders of the Railroad Commission stood alone, it might be open to the defendant to question their validity in this case. It is not necessary to decide this question, as the confirmation of the orders by the state and federal courts in the decisions cited. above, make them conclusive in this case. The statute provides that the orders of the Commission shall be in force until set aside by an action brought under Section 26 of the act, or rescinded by the commission. Defendant has exhausted its remedies under Section 26 and these orders must therefore, be given effect until further action by the commission itself. I, therefore, sustain the objection to the proofs offered by defendant. Defendant may have the benefit of an exception to this ruling and by its offer and exception, will be protected on appeal."

(R. 78.)

34.

That the court erred in its conclusions of law in such opinion wherein is stated:

"The commission rates became the law of the state twenty days after service of the commission's orders. The order reducing 199 the switching charges to Fletcher's Dam, therefore, took effect on November 24, 1909, and the log rate orders took effect November 26, 1909. Defendant had the right to attack these orders in the courts, but was charged with knowledge that if its attack did not succeed the orders would be considered as effective from the above dates. These dates should, therefore, be used as the dates from which to compute plaintiff's damages. This conclusion is not changed by the fact of defendant's delay in posting and filing its new tariff, or by the pendency of litigation during this period of delay, nor by the stipulation signed by the Attorney General and relied upon by defendant.

For the above reasons defendant's motion to dismiss is denied."

(R. 79.)

35.

That the court erred in its conclusions of law wherein is stated:

"In order to enjoy the fifty cent differential plaintiff is not required to prove the reshipment by rail of the manufactured product from exactly the same logs which were shipped in by rail. The amount and nature of the merchandise reshipped are the important features. In the case of a sawmill, a thousand feet of lumber should be considered as the manufactured product of a thousand feet of logs. In the case of other industries, the words "manufactured product" should be construed in their ordinary sense as meaning such merchandise in nature and quantity as under ordinary circumstances will reach the market, as a result of the manufacturing processes through which the logs go. Sawdust, slabs and other waste and incidental by-products may be properly ignored."

(R. 79.)

200

36.

That the court erred in its second finding of facts stated therein as follows:

"Plaintiff during the period for which damages are allowed reshipped over the line of the defendant railroad company, manufactured product which exceeded the amount manufactured from the logs shipped in by rail, and covered by the particulars of plaintiff's claim. For the purposes of this finding I adopt the schedules annexed to the deposition of Henry E. Fletcher with the same force as if they were set out at length in this finding."

In this connection defendant alleges error in the schedule of Henry E. Fletcher referred to by the court in such finding of facts and makes such schedule a part of this assignment.

(R. 80.)

37.

That the court erred in its third finding of facts wherein damages are to be awarded plaintiff in the sum of $27,184.97 with interest at five per cent from November 13, 1916.

Assignments of Error in connection with the requests made on behalf of defendant for findings of fact and conclusions of law, and in connection with the court's proceedings and doings with reference thereto.

(R. 82.)

38.

That the court erred in not complying with Circuit Court Rule 45 which reads as follows:

"When cases are tried by the court without a jury either
201 party may, if he sees fit, at any time before judgment, present
such points of law as may be deemed material, in the same manner in which such points are presented upon requests to charge in jury trials, and the court in its findings shall pass specially on all such points as in charging a jury, as near as may be."

Also that the court erred in not complying with Section 14 of Chapter 18 of the Judicature Act which provides as follows:

"In giving a decision in actions at law, the court shall specify in writing the facts found and the conclusions of law therein, upon the request of either party."

In pursuance of the opinion of the court made on the 13th day of November, 1916, prior to the rendition of judgment, and in pursuance of the rule and statute above quoted, the defendant presented to the court before judgment forty-four separate and distinct requests for findings of fact and conclusions of law, and requested said court and the judge thereof to pass specially on each point and question contained in such forty-four requests.

That said court did not pass specially upon such request, but instead thereof accepted the language of counsel for plaintiff as set forth in a paper entitled "Rulings on Defendant's Request to modify and add to the opinion, findings of fact and conclusions of law made herein."

Error is assigned now here on the failure of the court to so pass specially upon such points and questions, and upon the court's adoption of the language of plaintiff's counsel in the proceedings taken in connection with such requests of defendant.

(R. 75-83.)

202 39.

That the court erred in not passing specially upon the points and questions raised by defendant's first request, which request relates to the validity of the petitions and complaints upon which the orders made by the Michigan Railroad Commission were based as declared upon by plaintiff, and in adopting plaintiff's counsel's disposition of such request by the following language:

"The first request made by defendant is refused."

(R. 112.)

40.

That the court erred in not passing specially in writing upon defendant's second request which relates to the validity of the orders of the Railroad Commission set forth in plaintiff's Declaration, and in adopting the language of counsel for plaintiff in disposing of said request as follows:

"The second request is refused."

(R. 112.)

41.

That the court erred in not passing specially in writing upon the defendant's third request, which relates to the necessity of filing, posting and publishing the tariff of rates named in such orders, and by adopting the language of counsel for plaintiff disposing of such request as follows:

"The third request is refused."

(R. 112.)

42.

203 That the court erred in not passing specially in writing upon the points and questions contained in defendant's fourth request which relates to the restraining order made by Judge Mandell, and the stipulation made between Attorney General John E. Bird on behalf of the Commission, and James McNamara on behalf of the defendant, and relates to the date when said orders would become effective by virtue of such order and stipulation and in adopting the language of plaintiff's counsel in disposing of said request as follows:

"The fourth request is refused."

(R. 112.)

43.

That the court erred in refusing to pass specially upon the points and questions raised by defendant's fifth request which relates to the motion made by defendant to dismiss the plaintiff's suit at the conclusion of plaintiff's proofs, and in adopting the language of plaintiff's counsel in disposing of such request as follows:

"The fifth request is refused."

(R. 113.)

44.

That the court erred in not passing specially in writing upon the points and questions raised by defendant's sixth request which relates to the institution of proceedings before compliance with subsection (*f*) of Section 10, Act 300 of the Public Acts of 1909, and in adopting the language of plaintiff's counsel in disposing of such request as follows:

"The sixth request is refused."

(R. 113.)

45.

That the court erred in not passing specially in writing
204 upon the points and questions contained in defendant's
seventh request relative to conditions precedent to the commencement of this suit, and the procedure to collect the claims made by the plaintiff's declaration, and in adopting the language of plaintiff's counsel in disposing of such request in the following manner:

"The seventh request is refused."

(R. 113.)

46.

That the court erred in not passing specially in writing upon the points and questions contained in defendant's eighth request relative to the motion made by and on the part of the defendant to submit proofs relative to -he issues framed and made between the parties; and in adopting the language of plaintiff's counsel in disposing of such request, therein sustaining the objection made by plaintiff to the submission of proofs indicated in such motion.

(R. 113.)

47.

That the court erred in not passing specially upon the points and questions contained in defendant's ninth request and in denying the same, such request relating to the determination of the amount due before commencement of suit and permitting defendant to refund or pay to plaintiff any such amount so found due; and in adopting the language of plaintiff's counsel in disposing of such request as follows:

"The ninth request is refused."

(R. 113.)

48.

That the court erred in refusing defendant's tenth request,
205 and in not passing specially in writing on the points and
questions therein contained, such request relating to the noncompliance on the part of the plaintiff with the mandatory and other provisions of section 10 of the act hereinbefore referred to; and in adopting the language of plaintiff's counsel in disposing of such request as follows:

"The tenth request is refused."

(R. 113.)

49.

The court erred in denying defendant's 11th request and in not passing specially upon the points and questions therein contained, such request relating to the failure to schedule the tariff of rates and the switching charges, and the failure to post and publish the same pursuant to the statute; and by adopting the language of plaintiff's counsel in disposing of the same as follows:

"The 11th request is refused."

(R. 113.)

50.

That the court erred in denying defendant's 12th request relative to requiring plaintiff to elect whether it demanded recovery by virtue of Act 300 of the Public Acts of 1909 or whether it claimed the right to recover by common law; and adopting the language of plaintiff's counsel in disposing of the same in the manner following:

"In respect to the 12th request the special counts of plaintiff's declarations show to what extent plaintiffs rely upon the statute and to what extent upon the common law. The nature of the proofs submitted by plaintiffs shows that the claims made by plaintiffs upon this hearing are based upon these special counts, and 206 there has been no indication of any other or inconsistent claims based upon the common counts or otherwise. Plaintiffs are not taking any inconsistent positions and I see no ground for requiring any election. The 12th request is, therefore, refused."

(R. 113.)

51.

That the court erred in denying defendant's 13th request relating to the right of plaintiff to recover under both the common law and the statute, and in not passing specially upon the points and questions therein contained; and in adopting the language of plaintiff's counsel in disposing of said request as follows:

"The 13th request is refused for the same reason."

(Referring to the 12th request.)

(R. 113.)

52.

That the court erred in refusing to grant defendant's 14th request relative to the construction of paragraph 3 of the court's conclusions of law made November 13, 1916, and in failing to indicate what circumstances would authorize proceedings pursuant to Section 10 of said Act 300, and what circumstances would authorize proceedings and recovery under Section 22 of said act; and in not determining that this suit would be instituted by the plaintiff regardless of the circumstances and evidence submitted without invoking the provisions of Sections 10 of said act; and in not passing specially upon the points and questions contained in said request; and in adopting the language of plaintiff's counsel in disposing of such request as follows:

207 "The circumstances which will authorize proceedings pursuant to Section 10, Act 300 are the circumstances mentioned in that section. The same is true with respect to Section 22 of the Act. Except as herein stated the 14th request is refused."
(R. 114.)

53.

That the court erred in refusing the defendant's 15th request relative to the submission of proofs covering the time for which recovery is demanded, in event the court shall determine that plaintiff is entitled to recovery in whole or in part; and in not passing specially upon the points and questions contained in said request; and in adopting the language — the plaintiff's counsel in disposing of such request as follows:

"The 15th request is refused for the reasons stated with respect to the 8th request."
(R. 114.)

54.

That the court erred in refusing defendant's 16th request to submit evidence on the issues in this suit, in any event from and after August 15, 1910, that being the date when the last evidence was taken upon which such orders declared upon were based; and in not passing specially upon the points and questions in such request; and in adopting the language of plaintiff's counsel in disposing of such request as follows:

"The 16th request is refused for the reasons stated with respect to the 8th request."
(R. 114.)

208 55.

That the court erred in refusing defendant's 17th request to find that the order made by the Railroad Commission relative to the switching charge to and from the City of Alpena and the Fletcher Dam should be a commodity tariff rate and not a switching rate; and in not passing specially upon the points and questions in such request; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 17th request is refused."
(R. 114.)

56.

That the court erred in refusing defendant's 18th request to deny plaintiffs the right to recover because the Wayne Circuit Judge in the so-called Rate Case peremptorily declined to hear defendant's motion for a rehearing; and in not passing specially on the points and questions in such request; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 18th request is refused."

(R. 114.)

57.

That the court erred in refusing defendant's 19th request to find and determine that in event plaintiffs invoke the common law remedy in support of a judgment, it would operate as a repeal of the statute to the extent of such invocation; and in not passing specially on the points and questions in said request; and in adopting the language of plaintiff's counsel in disposing of the same as follows:

"The 19th request is refused."

(R. 114.)

209 58.

That if this court shall determine that the language used by the trial judge with reference to defendant's 20th request, in effect permits this court to review all questions raised by such demurrer on this appeal, no assignment of error is alleged in connection therewith. If, however, the language of the trial court leaves any questions involved in such demurrer in a condition which may be treated by this court as settled or decided, by overruling the demurrer, in that event and to that extent defendant alleges that the court erred in not granting defendant's 20th request as submitted; and in not passing more definitely and specifically upon the points and questions therein contained.

(R. 114.)

59.

That the court erred in refusing defendant's 21st request to find and determine that any rebate of fifty cents per thousand feet of the manufactured product shipped out, such rebates could only be accorded the plaintiff by the out-shipment of the actual products manufactured from the same forest products by the defendant; and by not passing specially upon the points and questions in such request; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 21st request is refused."

(R. 114.)

60.

That the court erred in refusing defendant's 22nd request to find that any parts of forest products shipped to the plaintiffs which were not actually shipped out, should be credited to the defendant; and in failing to pass specially on the points and questions in

210 such request; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 22nd request is refused, and in respect to the subject of such request, I find that the hearts of veneer logs are to be treated like slabs and sawdust as incidental by-products which can be ignored in considering the reshipment of the manufactured product."

(R. 114.)

61.

That the court erred in refusing defendant's 23rd request that any judgment for plaintiff would be contrary to the great weight and preponderance of evidence; and not passing specially upon the points and questions therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 23rd request is refused."

(R. 114.)

62.

That the court erred in refusing defendant's 24th request to charge that in no event could the plaintiff recover for any amounts collected by the defendant at a date prior to six months before the commencement of suit pursuant to sub-section (*g*) of said section 10; and in not passing specially on the points and questions therein; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 24th request is refused."

(R. 114.)

211 63.

That the court erred in refusing defendant's 25th request to the effect that the three several commission orders declared upon expressly provide for the posting and publishing of rates, and that said orders were not posted and published until April 18, 1915, and the provisions of said order respecting such posting and publishing were mandatory; and by not passing specially upon the points and questions therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 25th request is refused."

(R. 114.)

64.

That the court erred in refusing defendant's 26th request to find that no amount could be recovered by reason of sections 16 and 18 of said act, and that by exacting amounts from the plaintiff other or different than the posted and published tariff would be a violation of the statute; and by not passing specially upon the points and questions therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 26th request is refused."

(R. 114.)

### 65.

That the court erred in refusing defendant's 27th request to determine and find that defendant by collecting a different rate than the posted and published tariff would thereby destroy the uniformity of rates provided by statute, and such proceeding would be illegal; and by not passing specially upon the points and questions raised therein; and by adopting the language of plaintiff's counsel
212 in disposing thereof as follows:

"The 27th request is refused."

(R. 114.)

### 66.

That the court erred in refusing defendant's 28th request to find and determine that section 10 of said act was designed to provide reparation to the shipper and that it relates exclusively to rates exacted prior to the commencement of any suit for the recovery of asserted excessive or illegal rates, and that plaintiffs had not complied therewith; and in not passing specially upon the points raised therein; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 28th request is refused."

(R. 114.)

### 67.

That the court erred in refusing defendant's 29th request to find that section 22 provided no remedy for the recovery of such rates collected by defendant, and that section 10 did provide such remedy, such section 10 having been ignored in plaintiff's proceedings in this cause; and in not passing specially upon the points and questions raised therein; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 29th request is refused."

(R. 114.)

### 68.

The court erred in not finding and deciding as requested by defendant's 30th request; and in not passing specially upon the points and questions therein; and in holding and deciding as requested by plaintiff's counsel in the following language:

213 "In regard to the 30th request it is impossible to generalize accurately in a few lines in respect to the application of section 22 of the statute. The section is plainly expressed and no generalization in regard to its application is necessary for a determination of this case. The 30th request is, therefore, refused."

(R. 115.)

69.

That the court erred in not finding that on the 24th of November, 1909, an injunction was issued by Hon. George S. Hosmer, circuit judge of Wayne county, restraining the Michigan Railroad Commission from putting into operation or making effective the orders declared upon; and by using the language of plaintiff's counsel in disposing of defendant's 32nd request to charge as follows:

"I find that on November 24, 1909, Thomas F. Farrell, register of the circuit court for the county of Wayne, in chancery, signed as such register a document of which a copy appears on page 152 of the printed record in the rate case, which copy may be used as if set forth in this finding."

(R. 115.)

70.

That the court erred in its finding as to defendant's 33rd request by stating the facts relative to the stipulation therein referred to, but wi-hout making reference to the injunc-ion and the order to show cause, and the hearing thereon, and without finding and passing specially upon the other points and questions in such request contained; and by adopting the language of plaintiff's counsel in disposing thereof.

(R. 115.)

214 71.

That the court erred in not passing specially upon all points and questions raised by the defendant's 34th request; and in not finding that the circuit judge of Wayne county peremptorily refused to hear defendant's counsel upon their motion made and presented to that court for a rehearing; and in adopting the language of plaintiff's counsel in disposing of such request.

(R. 115.)

72.

That the court erred in refusing defendant's 35th request; and in not passing specially upon the points and questions therein; and in adopting the language of plaintiff's counsel in reference thereto as follows:

"The 35th request is denied."

(R. 116.)

73.

That the court erred in refusing defendant's 36th request with reference to the rendition of judgment in favor of the plaintiff as indicated by the court's opinion of November 13, 1916, upon the evidence submitted and without permitting defendant to supplement such evidence in support of the orders declared upon; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 36th request is denied."

(R. 116.)

74.

That the court erred in refusing defendant's 38th request with reference to the force and effect to be given to the stipulations 215 in connection with the bill of particulars in this cause; and in not passing specially upon all points and questions raised therein; and in adopting the language of plaintiff's counsel in disposing thereof.

(R. 116.)

75.

That the court erred in refusing defendant's 40th request; and in not passing specially upon the points and questions therein contained, to the effect that the provisions of said Act 300 did not make the orders effective until the provisions applicable to the legality of such orders were complied with, and with reference to the construction of the statute with reference to the twenty day period and the provisions relative to the filing of schedules and posting and publishing the rates provided for by the statute; and in adopting the language of plaintiff's counsel in disposing of such request as follows:

"The 40th request is refused."

(R. 116.)

76.

That the court erred in refusing defendant's 41st request to find that the rebate provisions in the tariffs of defendant railway company and in the orders of the railroad commission violated the act referred to; and in not passing specially upon the points and questions therein contained; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 41st request is refused."

(R. 116.)

77.

That the court erred in refusing defendant's 42nd request to find that the common law remedies for irregular or exorbitant 216 charges by railroad companies for the carriage of freight have been superceded and abolished by such statute, Act 300 aforesaid; and by not passing specially upon the points and questions therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 42nd request is refused."

(R. 116.)

78.

That the court erred in refusing defendant's 43rd request as to the construction of section 22 of said Act 300, with reference to the rates and charges; and by not passing specially upon all points and questions therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 43rd request is refused."

(R. 116.)

79.

That the court erred in refusing defendant's 44th request relative to litigation subsequent, and in reference to the orders declared upon, and the prevailing conditions incident thereto; and by not passing specially upon the points and questions involved therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 44th request is refused."

(R. 117.)

80.

That the court erred in signing and filing in this cause on the 27th day of November, 1916, the additional findings of fact prepared by plaintiff's counsel consisting of 36 numbered findings and 217 paragraphs; and by adopting the language of plaintiff's counsel in making such findings.

(R. 105-112.)

81.

That the court erred in the 31st numbered additional finding of fact wherein is stated the following:

"The facts and figures set forth in plaintiff's bill of particulars are true and correct and may be treated as if set forth in this finding."

And in adopting the language of plaintiff's counsel in the preparation and making of such finding.

(R. 111.)

82.

That the court erred in making the 32nd additional finding of fact as follows:

The facts and figures set forth in the interest statement annexed to the deposition of Roy Richardson as Exhibits 1 and 2 are -rue and correct and may be treated as if said exhibits were set forth in this finding.

(R. 111.)

83.

That the court erred in making its 33rd additional finding of fact wherein is stated as follows:

The first payment of freight made by plaintiff to defendant after the making of the orders by the Michigan Railroad Commission above mentioned was accompanied by a tender and refusal of the rates fixed by the Commission. Thereafter plaintiff's president asked defendants' freight and passenger agent at Alpena if it was necessary to continue making such tenders. Said freight and passenger agent replied that he had been instructed by his su-
218 periors not to accept such tenders and that he would continue
to refuse them until plaintiff was notified to the contrary. Thereafter payments were made under protest and certain of the expense bills were stamped "Paid under protest."

And in adopting the language in the preparation of such finding as prepared and presented by counsel for plaintiff.

(R. 111-112.)

### 84.

That the court erred in making its 34th additional finding of fact wherein is stated as follows:

The difference between the amounts shown by plaintiff's bill of particulars and the amount for which plaintiff is permitted to recover represents overcharges paid prior to November 26, 1909.

(R. 122.)

### 85.

That the court erred in making its 35th additional finding of facts wherein is stated as follows:

"When the plaintiff paid to the defendant the various sums for which recovery is sought herein, defendant's representative receiving such payments stamped upon the receipts (called expense bills) an indorsement substantially as follows: 'Paid under protest,' or 'Paid under protest on account of excessive charges. Fletcher Paper Company, by W. F. Victor, Treas.' "

(R. 110.)

### 86.

That the court erred in denying defendant's application for a new trial pursuant to the motion made and the reasons therein set forth of date January 22, 1917, and in the reasons filed for such
decision in denying motion for new trial on the 27th day of
219 February, 1917.

(179-181.)

### 87.

That the court erred in denying defendant's motion for new trial wherein the court in his reasons therefor amongst other things held that the judgments were not unauthorized; that the court did not err in overruling defendant's motion to dismiss; that the orders of the Railroad Commission were not void and without force; that the court rightfully overruled defendant's motion as to the election of counts;

that the court correctly construed the statutes involved in this cause, being various sections of Act No. 33 of the Public Acts of 1909.

(R. 179-181.)

88.

That the court erred in the sixth paragraph of such decision denying said new trial wherein is stated the following:

"In considering the matters set forth in defendant's sixth reason for the granting of a new trial, I am satisfied that the court reached a judicial determination of the matters submitted and referred to in said motion, and the action of the court in this regard did not constitute an error nor prejudice the rights of defendant."

(R. 180.)

89.

That the court erred in overruling said motion for new trial and in holding in his reasons therefor that no error was made by failing to comply more fully with circuit court Rule 45 as alleged on behalf of defendant.

(179-181.)

220 90.

That the court erred in overruling defendant's motion for new trial in holding that in determining the requests of defendant the court pass specially or judicially upon the various requests and questions submitted the court.

(179-181.)

91.

That the court erred in overruling defendant's motion for new trial and in so doing, determining that the circuit judge with whom the requests were filed on the 27th day of November, 1916, sufficiently considered the same, notwithstanding such requests were peremptorily denied on the same day, and for the reasons prepared by plaintiff's counsel subsequent to submitting the same to the court.

(179-181.)

92.

That the court erred in the 11th paragraph of his reasons for denying said new trial on the ground of newly discovered evidence, asserting that such evidence was not so material as to operate as a mistrial, or even a miscarriage of justice. However, in making this assignment of error, in consideration of the concession of plaintiff's counsel that this court might consider such testimony on the hearing of this cause on its merits, to the extent that such testimony is set forth in such motion for new trial, and to the extent that such testimony so set forth in such motion shall be considered by this court in determining the issues involved in this case upon its merits, no error is assigned in connection therewith.

(R. 181.)

221 93.

The defendant now here claims the benefit in these assignments of error of all exceptions filed to the denial of its motion for new trial of date February 28, 1917, filed in said cause March 1, 1917, each of such exceptions being now here alleged as a part and portion of defendant's assignments of error.

(179-181.)

94.

That the court erred in deciding that the plaintiff was entitled to judgment, and in entering a judgment for plaintiff as appears of record in this cause.

(R. 117.)

95.

That the court erred in deciding and ruling that the common law action of assumpsit for excessive or illegal freight charges *have* not been taken away by statute.

(R. 78.)

96.

That the court erred in deciding and ruling that Act No. 300 of the Public Acts of 1909 as amended, gives additional rights and remedies, but creates no new form of action.

(R. 78.)

97.

That the court erred in deciding and ruling that the rates named in the orders of the Michigan Railroad Commission declared upon in this cause, became the law controlling the parties hereto twenty days after the service of such orders, viz: November 24, 1909, and November 26, 1909.

(R. 79.)

222 98.

That the court erred in deciding and ruling that the defendant's delay in posting and filing its schedule of tariff rates, or by the pending of the litigation, or the stipulation of Attorney General, did not change of the conclusions that the orders of the commission were the law of the state and controlling the parties hereto twenty days after the service of such orders.

(R. 79.)

99.

That the court erred in deciding that the plaintiff can recover the differential rebate of fifty cents per thousand feet as an excessive

charge, and without proving the reshipment by rail of the manufactured product from exactly the same logs which were shipped in by rail.
(R. 79.)

100.

That the court erred in deciding and ruling that the orders declared upon are conclusive proof that the rates collected by the defendant were excessive and of the amount of the excess.
(R. 75-83.)

101.

That the court erred in deciding and ruling that the facts found by it supported its conclusions of law
(R. 75-83.)

Wherefore, this defendant and appellant prays that the judgment in favor of the plaintiff may be reversed and held for naught, etc.

223 Dated April 2nd, 1917.

JAMES McNAMARA,
HENRY & HENRY,
*Attorneys for Detroit & Mackinac Ry. Co., Appellant.*

Inasmuch as the exceptions taken as aforesaid, do not all appear in the record of said cause, said court, upon the application of counsel for both parties, has settled this bill of exceptions which contains all of the testimony taken, evidence submitted and proceedings had on said trial, and the court does hereby certify that in so far as the testimony is set out by questions and answers, it is necessary for the full understanding of the questions raised.

It is further certified that the said bill of exceptions when signed, was accompanied by the assignments of error on behalf of both parties; that of defendants being numbered 1 to 101 inclusive, and that of plaintiff 1 to 5 inclusive.

S. G. HOUGHTON,
*Circuit Judge.*

Signed and dated this 16th day of April, 1917.

224 At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court-room, in the Capitol, in the City of Lansing, on the Twentieth Day of June, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

Present the Honorable Franz C. Kuhn, Chief Justice; John W. Stone, Russell C. Ostrander, John E. Bird, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Grant Fellows, Associate Justices.

No. 27865.

RICHARDSON LUMBER COMPANY

vs.

DETROIT AND MACKINAC RAILWAY COMPANY.

This cause coming on to be heard is argued by Mr. Clark for the Plaintiff and Mr. Baker and Mr. Henry for the defendant and is duly submitted.

Chief Justice Kuhn and Justices Bird and Fellows, being disqualified, did not participate in the above hearing.

225 At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court-room, in the Capitol, in the City of Lansing, on the Twenty-seventh Day of September, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

Present the Honorable John W. Stone, Russell C. Ostrander, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Justices.

No. 27865.

RICHARDSON LUMBER COMPANY, a Corporation, Plaintiff and Cross-appellant,

vs.

DETROIT AND MACKINAC RAILWAY COMPANY, a Corporation, Defendant and Appellant.

The record and proceedings in this cause having been removed to this court by Writ of Error, issued to the Circuit Court for the County of Bay, and the same, and the matters in error assigned, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court there is No Error, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Bay be and the same is hereby in all things affirmed.

No costs will be awarded either party hereto.

226 UNITED STATES OF AMERICA, *ss:*

To Richardson Lumber Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan, wherein Detroit & Mackinac Railway Company is plaintiff in error and you are defendant in error, toshow cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this twenty-sixth day of December, in the year of our Lord one thousand nine hundred and seventeen.

WILLIAM R. DAY,
*Associate Justice of the Supreme Court of the United States.*

As attorney for the defendant in error, as herein named, I acknowledge and accep- service of the foregoing citation at Bay City, Michigan, this 2nd day of January, 1918.

EDWARD S. CLARK.

On this 4th day of January, in the year of our Lord one thousand nine hundred and eighteen, personally appeared Carl R. Henry before me, the subscriber, a Notary Public in and for Alpena County, State of Michigan, and makes oath that he delivered a true copy of the within citation to Edward S. Clark, attorney for the defendant in error, the Richardson Lumber Company within named, at the City of Bay City, State of Michigan, on the 2d day of January, 1918.

CARL R. HENRY.

Sworn to and subscribed the 4th day of January, A. D. 1918.

MARIE REINKE,
*Notary Public in and for Alpena County, Michigan.*

My commission expires August 30th, 1920.

STATE OF MICHIGAN,
*County of Alpena, ss:*

On this 4th day of January, in the year of our Lord one thousand nine hundred and eighteen, personally appeared Carl R. Henry, before me the subscriber, a notary public in and for Alpena County, State of Michigan, and makes oath that he delivered a true copy of the within citation to Fred L. Richardson, president of the defendant in error, the Richardson Lumber Company, a corporation, by so delivering such true copy to him at the City of Alpena, County of Alpena and State of Michigan, on the 4th day of January, A. D. 1918.

CARL R. HENRY.

Sworn to and subscribed the 4th day of January, A. D. 1918.

[Seal Marie Reinke, Notary Public, Alpena Co., Mich.]

MARIE REINKE,
*Notary Public in and for Alpena County Michigan.*

My commission expires August 30th, 1920.

227 Copy.

Know all men by these presents, that we, the Detroit and Mackinac Railway Company, a Michigan corporation as principal, and the National Surety Company of New York, as surety, are held and firmly bound unto the Richardson Lumber Company, a Michigan corporation, in the full and just sum of Fifty-seven thousand ($57,000) Dollars, to be paid to the said Richardson Lumber Company, its certain attorney, successors or assigns; to which payment, well and truly to be made we bind ourselves, and our successors, jointly and severally by these presents. Sealed with our seals and dated this 22d day of December, in the year of our Lord, one thousand nine hundred and seventeen.

Whereas, lately at a session of the Supreme Court of Michigan in a suit depending in said Court, between the Richardson Lumber Company as plaintiff and appellee and the Detroit and Mackinac Railway Company as defendant and appellant, a judgment was rendered against the said Detroit and Mackinac Railway Company for $28,318.80 and the said Detroit and Mackinac Railway Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Richardson Lumber Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now the condition of this obligation is such, that if the said Detroit and Mackinac Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

DETROIT & MACKINAC RAILWAY COMPANY,
By J. D. HAWKS, [SEAL.]
*Vice-Pres. & Genl. Mgr.*
NATIONAL SURETY COMPANY,
By W. H. RONSAVILLE, [SEAL.]
*Attorney in Fact.*

Sealed and delivered in the presence of
FRED A. BAKER.
FORREST CURTIS.

Approved by—
WILLIAM R. DAY,
*Associate Justice of the Supreme Court of the United States.*

228 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Detroit & Mackinac Railway Company, appellant, and Richardson Lumber Company, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or 229 authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Detroit & Mackinac Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-sixth day of December, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
*Clerk of the Supreme Court of the United States.*

Allowed by

WILLIAM R. DAY,
*Associate Justice of the Supreme Court of the United States.*

230 To the Supreme Court of the United States of America:

The execution of the within Writ appears by the transcript of Record hereto annexed.

Lansing, Michigan, January 9, 1918.

JAY MERTZ,
*Clerk of the Supreme Court of the State of Michigan.*

[Endorsed:] Supreme Court of the United States, October Term, 1917. Detroit & Mackinac Railway Company, Plaintiff in Error, vs. Richardson Lumber Company. Writ of Error.

231 Supreme Court of the State of Michigan.

DETROIT & MACKINAC RAILWAY COMPANY, Plaintiff in Error,

vs.

RICHARDSON LUMBER COMPANY, Defendant in Error.

IN THE SUPREME COURT, *ss:*

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and the proceedings had and determined in the above entitled cause by said Supreme Court; the Writ of Error with allowance endorsed thereon, the citation with acceptance of service endorsed thereon by the attorney for the adverse party, together with proof of service thereof on defendant in error, and a copy of the bond duly approved.

I further certify that the opinion of the court in said cause, the Petition for the Writ of Error, together with the assignments of error, with prayer for reversal in the Supreme Court of the United States, are duly certified up in the companion case of Detroit and Mackinac Railway Company, Plaintiff in Error vs. Fletcher Paper Company, Defendant in Error.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing, this 9th day of January, in the year of our Lord one thousand nine hundred and eighteen.

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,
*Clerk of the Supreme Court of Michigan.*

Endorsed on cover: File No. 26295. Michigan Supreme Court. Term No. 828. Detroit & Mackinac Railway Company, plaintiff in error, vs. Richardson Lumber Company. Filed January 24th, 1918. File No. 26295.

[illegible]

# Supreme Court of the United States.

October Term, 1918.

No. [illegible]

DETROIT & MACKINAC RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

RICHARDSON LUMBER COMPANY, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Michigan.

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IN THE

# Supreme Court of the United States

October Term, 1918.

No. 339.

DETROIT & MACKINAC RAILWAY COMPANY,
PLAINTIFF IN ERROR,
*v.*
RICHARDSON LUMBER COMPANY, DEFENDANT IN ERROR.

**In Error to the Supreme Court of the State of Michigan.**

## MOTION TO DISMISS, AFFIRM, OR TRANSFER TO THE SUMMARY DOCKET.

Now comes the above named defendant in error, by its counsel herein, and moves this honorable court:

1. To dismiss the writ of error herein on the ground that this court has not jurisdiction thereof.

2. To affirm the judgment of the Supreme Court of the State of Michigan, on the ground that it is manifest that this writ was taken for delay only, and that the questions on which the decision of the cause depend are so frivolous as not to need further argument.

3. If this court shall refuse to dismiss or affirm, then to transfer this cause for hearing to the summary docket, because the cause is of such a character as not to justify extended argument.

A brief statement of the facts and objects of this motion is filed herewith and made a part hereof.

Edward S. Clark,
*Counsel for Defendant in Error.*

## NOTICE OF MOTIONS.

To Detroit & Mackinac Railway Company,
Plaintiff in Error:

You are hereby notified that the defendant in error in the above entitled cause will, on Monday, October 7, 1918, at the meeting of the Supreme Court of the United States, on that day or as soon thereafter as counsel can be heard, submit for the consideration of said court, the foregoing motions and each of them, and the brief in support thereof hereto annexed, all of which are now served upon you herewith.

Yours, etc.,

Edward S. Clark,
*Counsel for Defendant in Error.*

State and Eastern District of Michigan, } ss.
County of Bay.

Laura Kennedy, of Bay City, Michigan, being duly sworn, deposes and says that on the 15th day of August, 1918, she served a motion to dismiss, affirm or transfer to the summary docket, of which the annexed is a true copy, together with the statement and brief of defendant in error in support thereof, a true copy of which is also hereto annexed, upon James McNamara, Fred A. Baker and Charles R. Henry, counsel for plaintiff in error, by carefully enclosing a copy thereof in a sealed envelope, plainly addressed to said McNamara, at 2026 Dime Bank Building, Detroit, Michigan, another copy thereof in a separate sealed envelope, plainly addressed to said Baker, at 526 Dime Bank Building, Detroit, Michigan, and another copy thereof, in a separate sealed envelope, plainly addressed to said Charles R. Henry, at Alpena, Michigan (the addresses so used being the business addresses of each respectively), and depositing each of said envelopes in the United States postoffice, in the city of Bay City, Michigan, with postage fully prepaid; the same being so deposited as to reach each of said addresses in due course of mail, more than three weeks prior to October 7, 1918.

Laura Kennedy.

Sworn to and subscribed before me, this 15th day of August, 1918.

Jessie Thompson,
Notary Public in and for
Bay County, Michigan.

My commission expires April 16, 1919.

## STATEMENT OF THE FACTS AND OBJECTS OF THIS MOTION.

This is one of five cases (numbers 336-340, inclusive), in which the records are practically the same, except as to the identity of the several defendants in error and the amounts involved. A separate brief is filed in each case, but each brief is a mere reprint of the others, with the exception of the record references. The opinion of the Supreme Court of Michigan, the petition for the writ of error, and the assignments of error in this court are printed only in one of the records (that in the case of the Fletcher Paper Company, number 336). References to that record, in this brief, will be indicated by the initials "F. P. R." References to the record in the case at bar will be indicated by the initial "R."

These cases are an outgrowth of litigation reported as:

*Detroit & Mackinac Railway Co. v. Michigan Railroad Commission*, 171 Mich., 335.
*Detroit & Mackinac Railway Company v. Michigan Railroad Commission*, 203 Fed., 864.
*Detroit & Mackinac Railway Company v. Michigan Railroad Commission*, 235 U. S., 402.
*Michigan Railroad Commission v. Detroit & Mackinac Railway Company*, 182 Mich., 234.
*Michigan Railroad Commission v. Detroit & Mackinac Railway Company*, 184 Mich., 242.
*Michigan Railroad Commission v. Detroit & Mackinac Railway Company*, 185 Mich., 649.

The litigation resulted from certain orders of the Michigan Railroad Commission made in October and November, 1909. These orders involved switching charges and freight rates to Alpena, a city in the northern part of the lower peninsula of Michigan. The rates and charges in question applied only to logs and forest products shipped from points on the line of the Detroit & Mackinac Railway Company (plaintiff in error) to Alpena. These shipments were wholly intrastate, the road of plaintiff in error being located entirely within the state of Michigan.

The proceedings, up to the time of the former decision of this court are summarized in the opinion of Mr. Justice Holmes, filed on December 14, 1914, and reported in 235 U. S., page 402. As there stated, plaintiff in error had filed a bill of complaint in the state court to set aside the rates fixed by the Railroad Commission, and to enjoin their enforcement. This bill was dismissed and the rates affirmed by the state circuit court and on appeal, by the Supreme Court of Michigan. An original bill of complaint was then filed in the district court of the United States for the eastern district of Michigan, in equity. This bill sought substantially the same relief as that sought by the bill of complaint previously filed in the state court. An application for a preliminary injunction was heard by three judges, as required by the Judicial Code, and on their denying the writ (see 203 Fed., 864), an appeal was taken to this court which affirmed the decree of the district court (235 U. S., 402). The district court thereupon, on December 28, 1914, dismissed the bill of complaint (R., 73, paragraph 27). During the pendency of the appeal to this court, and thereafter, the case was again before the Michigan Supreme Court on three different hearings, the opinions being reported in 182 Mich., 234; 184 Mich., 242, and 185 Mich., 649. The first of these resulted in the issuance of a writ of mandamus requiring the railroad company to put the rates into effect, and the second held the railroad company guilty of contempt of court for failing to comply with the writ of mandamus (R., 54). A freight tariff conforming to the orders of the Michigan Railroad Commission was finally, for the first time, filed by plaintiff in error, on February 18, 1915 (R., 55). A period of more than five years had thus elapsed between the taking effect of the orders of the Michigan Railroad Commission in November, 1909 (R., 72), and the compliance with these orders by the plaintiff in error, on February 18, 1915 (R., 55). During all this time the shippers of logs to Alpena had been compelled to pay under protest, rates higher than those fixed by the Commission, and five actions, of which this is one, were commenced in the state court (the circuit court for the county of Bay) in April, 1915 (R., 6), to recover the difference between the rates paid and the rates fixed by the Commission. The declaration was framed on the theory of a common law action of assumpsit (a modified form of common law practice still being in effect in Michigan), the common counts being added to special counts reciting the illegal exaction of excessive rates and the resulting duty to repay the excess to the shipper (R., 12-14). It was sought to recover only the overcharges paid after November 26, 1909, when the orders of the Railroad Commission became legally effective. Items aggregating $3,333.90, which had accrued prior to that date were abandoned on the trial (R., 36, 49).

The five cases were consolidated for hearing and were heard by the trial judge without a jury. All substantial questions of fact in respect to the amounts paid and the difference between those amounts and the amounts collectible under the orders of the Michigan Railroad Commission were settled by an audit prior to trial, and a stipulation was filed adopting plaintiff's bill of particulars, with certain modifications, as a correct statement of the overcharges paid, subject to the legal contentions of the plaintiff in error (R., 41). An opinion was filed by the circuit judge (R., 53-58), overruling the objections and contentions of plaintiff in error and assessing damages at the sum of approximately $28,000. (The combined damages in the five cases aggregated about one hundred thousand dollars.) This opinion was later supplemented by more detailed findings of fact (R., 71-75). All of the dates and further details necessary for a complete history of the whole litigation can be found in this opinion and supplemental findings.

The judgment of the circuit court was reviewed by writ of error in the Supreme Court of Michigan and was there affirmed by an opinion filed September 27, 1917, and found on pages 268-283 of the Fletcher Paper Company record.

This opinion has not yet been officially reported, but has been unofficially reported in volume 164 of the Northwestern Reporter, on page 528. The case is now here on writ of error.

Judgment was entered on November 27, 1916 (R., 78). The amendment of September 6, 1916, to Section 237 of the Judicial Code, took effect thirty days after its approval (Section 7 of the act). The decision of a motion to dismiss is, therefore, governed by the provisions of the new statute.

## ANALYSIS OF QUESTIONS INVOLVED.

The assignment of errors is found on pages 295-305 of the Fletcher Paper Company record. For the sake of clearness, we will condense, paraphrase and analyze the allegations of error, and will then compare them with a similar condensation and analysis of the corresponding portions of the opinion of the Supreme Court of Michigan.

## ANALYSIS OF ASSIGNMENTS OF ERROR.

1. (a) "To sustain this order (of the Michigan Railroad Commission) and grant the plaintiff (defendant in error) any relief on this order, would be a violation of the due process of law clause of the 14th amendment (of the Federal Constitution), and of the same clause of our own (the Michigan Constitution) (F. P. R., 298), because:

    1. There was no complaint to the Michigan Railroad Commission that the rates to Alpena, on logs, were unjust, unreasonable and excessive (F. P. R., 297).

    2. There was no hearing on any such allegation before the Michigan Railroad Commission (F. P. R., 297).

3. No evidence was introduced to show that the rates to Alpena were unjust, unreasonable and excessive (F. P. R., 297).

4. The complaint in that case related exclusively to the discrimination in favor of shipments as against Alpena (F. P. R., 297-98).

(b) The provision of this order (of the Michigan Railroad Commission) for a fifty-cent "refund" was an improper rebate and discrimination in favor of the Fletcher Paper Company (F. P. R., 298).

2. The Supreme Court of Michigan erred in affirming the ruling of the trial court in denying the motion to dismiss "on eighteen different grounds" (F. P. R., 298).

3. The Supreme Court of Michigan erred in affirming the rulings of the trial court in excluding certain proofs enumerated in the offer of evidence submitted by plaintiff in error (F. P. R., 298-300).

4. The Supreme Court of Michigan erred in affirming the opinion, findings of fact and conclusions of law of the trial judge (F. P. R., 300).

5. The Supreme Court of Michigan erred in affirming the action of the trial court in overruling the exceptions of plaintiff in error to the opinion and findings of fact and of law (F. P R., 300).

6. The Supreme Court of Michigan erred in affirming the action of the trial court in passing on the special requests and exceptions of plaintiff in error (F. P. R., 300-301).

7. The Supreme Court of Michigan erred in overruling the motion for a new trial made in the trial court by the plaintiff in error (F. P. R., 301).

8. The Supreme Court of Michigan erred in overruling all of the assignments of error filed by the plaintiff in error in that court (F. P. R., 301).

9. The Supreme Court of Michigan erred in certain parts of its opinion as follows:

   (a) In approving the nature of the remedy sought, the form of action selected, and the pleadings (F. P. R., 301-302).

   (b) In approving the ruling of the trial judge in excluding evidence designed to reopen the question of the reasonableness of the rates (F. P. R.. 302).

   (c) In holding that the Commission rates were in legal effect prior to the issuance of the writ of mandamus, and the compliance therewith by plaintiff in error (F. P. R., 302).

   (d) In holding that the temporary injunction, while permitting plaintiff in error to temporarily exact unlawful rates, did not legalize such exaction (F. P. R., 302).

   (e) In holding that the provision for the fifty-cent differential was a "milling in transit rate," and not unlawful (F. P. R., 302-303).

10. "Act 300 of the Public Acts of Michigan, of 1909, as construed and applied in these cases, is in conflict with the 14th amendment of the Constitution of the United States in that the Detroit & Mackinac Railway Company is thereby deprived of its rights and property without due process of law, and is denied the equal protection of the laws" (F. P. R., 303).

11. The Michigan statute, "although fair on its face," was construed "with minds so unequal and oppressive as to amount to a practical denial by the state of the

equal protection of the laws in violation of the 14th amendment of the Constitution of the United States" (F. P. R., 303-304).

12. The construction given to the state statute by the Michigan Supreme Court deprives plaintiff in error of its right to a judicial investigation of the reasonableness of the freight rates in question, and is in conflict with the due process of law clause of the 14th amendment of the Federal Constitution (F. P. R., 304).

13. The provision for the fifty-cent differential is in conflict with the Elkins Act and the Hepburn Act (F. P. R., 304-305).

14. In general, the invocation by plaintiff in error of the protection of the 14th amendment of the Federal Constitution was rejected and denied (F. P. R., 305).

## ANALYSIS OF DECISION OF MICHIGAN SUPREME COURT.

**First Point Decided** (F. P. R., 279-280).

This point was raised by counsel as follows (see recitals of counsel's claims (F. P. R., 278-79):

*As raised by plaintiff (defendant in error).*

> "Is a freight rate fixed by a state railroad commission considered as the lawful rate during chancery litigation to determine its legality?" (F. P. R., 279).

On this point the decision of the court was, in substance, as follows:

The action of the Michigan Railroad Commission established a legislative rate immediately in effect for the benefit of any and every shipper. The rates so fixed were not effective when and if an attack upon them failed, but were effective at once, pending such attack (F. P. R., 279-280).

**Second Point Decided** (F. P. R., 280).

*As raised by defendant (plaintiff in error).*

> "Whether a complaint to the Michigan Railroad Commission is not a necessary preliminary to any action by a shipper or consignee to recover excessive rates or charges which have been already collected by carrier" (F. P. R., 278).

*As raised by plaintiff (defendant in error).*

> "Is there any distinction between a common law action and a statutory action in such a case, and has there been any failure to select the proper remedy or to follow any statutory requirements which are necessary preliminaries to such an action" (F. P. R., 279).

The court decided this question substantially as follows:

(a) All attacks having failed, the Commission rate still stands. Defendant (plaintiff in error) having admittedly received rates higher than those fixed by the Commission, has money, which in equity and good conscience, it ought to restore to plaintiff (defendant in error) (F. P. R., 280).

(b) The money so due can be recovered in an action of assumpsit and it is wholly immaterial whether the declaration is based upon the statute and the action of the Commission, or upon the common counts (F. P. R., 280).

(c) The previous action of the Commission furnishes the necessary evidence of the unlawful character of the exaction. No statutory remedy is provided by the Michigan statute and no reapplication to the Commission is required as a preliminary to the commencement of suit, where as in this case, the action is in reliance upon and does not attack the previous order of the Commission (F. P. R., 280).

### Third Point Decided.

> *As raised by defendant (plaintiff in error).*
>
> "Was the defendant entitled to prove on the trial that the rates and charges collected were just and reasonable" (F. P. R., 279).
>
> *As raised by plaintiff (defendant in error).*
>
> "Defendant's offer of proof" (F. P. R., 279).

The court decided this question substantially as follows:

The trial court properly denied the defendant (plaintiff in error) the right to retry the question of the reasonableness of the rates. This results from the fact that the recovery of the plaintiff (defendant in error) is in reliance upon the Commission rates, and not in the course of an attack upon them. The Commission is the rate maker and it would be wholly incongruous from an administrative standpoint to have successive juries or different courts and judges passing upon the reasonableness of a rate already fixed by the Commission (one such attack having been carried without success to the court of last resort (F. P. R., 280-281).

### Fourth Point Decided.

> *As raised by plaintiff (defendant in error).*
>
> "Is the general rule changed by the delay of the Railroad Company in publishing and posting a new tariff in compliance with the orders of the Commission. Is the general rule affected by delay in the enforcement of the rate by mandamus" (F. P. R., 279).

The court decided this question substantially, as follows:

Defendant (plaintiff in error) cannot excuse its failure to give effect to the Commission rates by relying upon its own failure to post and publish them, because the Commission rates were conclusive whether or not they were in actual operation (F. P. R., 281).

**Fifth Point Decided.**

*As raised by defendant (plaintiff in error).*

> "Whether an injunction issued to prevent an order of the Commission from taking effect, no bond being required from the carrier and no order impounding the overcharge does not prevent the order from having any force or effect until the Commission obtains and serves a mandamus commanding the carrier to put the order into effect" (F. P. R., 278).

*As raised by plaintiff (defendant in error).*

> "Is the application of the general rule in this case changed by the injunction issued by the chancery court or the stipulation of the attorney general in respect thereto?" (F. P. R., 279).

This question was decided substantially as follows:

The temporary injunction secured upon representations afterwards held to be unfounded permitted defendant (plaintiff in error) to temporarily exact unlawful rates, but it did not legalize such exaction (F. P. R., 281).

**Sixth Point Decided.**

*As raised by defendant (plaintiff in error).*

> "Is the rebate of fifty cents per thousand feet of logs, shipped into Alpena on the defendant railroad in case the manufactured product is shipped out thereon, a legal discrimination against those who shipped out by water?" (F. P. R., 279).

*As raised by plaintiff (defendant in error).*

> "What are the plaintiff's rights in respect to an allowance for the outshipment of the manufactured product?" (F. P. R., 279).

The court decided this question substantially, as follows:

The fifty-cent differential was not an unlawful rebate, but was part of a lawful "milling in transit rate," and as such, authorized by the state statute (F. P. R., 281-282).

**Seventh Point Decided.**

The question of double damages, which was decided adversely to plaintiff (defendant in error) and is, therefore, of no present importance.

## ANALYSIS OF QUESTIONS NOW BEFORE THIS COURT.

The questions now before this court may be grouped as follows, with reference to the above analysis of the assignments of error and of the opinion of the Supreme Court of Michigan:

### I.

*First, Fourth and Fifth Points Decided by Supreme Court of Michigan.*

*(Assignment of Error,* Paragraphs 9 (c), 9 (d).

Did the Supreme Court of Michigan correctly construe the Michigan statute with respect to:

(a) The immediate effectiveness of a freight rate fixed by the Commission.

(b) The effect of delay in putting such a rate into actual operation, and

(c) The effect of a preliminary injunction suspending the operation of the rate.

## II.

*Second Point Decided by Supreme Court of Michigan.*

(*Assignments of Error,* Paragraph 9 (a).

Questions of pleading and practice; whether the proper form of action was selected, the proper pleadings filed and all essential preliminaries complied with.

## III.

*Third Point Decided by Supreme Court of Michigan.*

(*Assignments of Error,* Paragraphs 3, 9 (b), 12).

Should an opportunity have been given to plaintiff in error to reopen the question of the reasonableness of the rates, by submitting the evidence tendered in its offer of proof?

## IV.

*Sixth Point Decided by Supreme Court of Michigan.*

(*Assignments of Error,* Paragraphs 1 (b), 9 (e), 13).

The validity of the provision for a fifty-cent differential.

The following questions raised by the assignments of error were not mentioned in the opinion of the Supreme Court of Michigan:

## V.

*(Assignments of Error,* Paragraph 1 (a).

The validity of the original proceedings before the Michigan Railroad Commission.

## VI.

*(Assignments of Error,* Paragraphs 10, 11 and 14).

The claim that the construction of the Michigan statute, adopted by the Michigan courts, constitutes a violation of the Federal Constitution.

The remaining paragraphs of the assignments of error are too vague to require notice.

## ARGUMENT OF MOTION TO DISMISS.

The writ of error should be dismissed, not only because the record raises no question justifying the issuance of a writ of error, under the provisions of Section 237 of the Judicial Code, as amended by the Act of September 6, 1916, but also because there is no meritorious federal question of any kind. For convenience, instead of referring to the assignments of error consecutively by number, we will refer to the six questions now before this court by the numbers which we have given to them in our above "Analysis of Questions Now Before this Court."

Questions I and II are mere questions of local law. They involve nothing more than the construction of a Michigan statute by the Michigan courts in respect to issues of purely local importance. These questions not only fail to meet the requirements of Section 237 of the Judicial Code as amended, but also fail to raise anything which resembles a federal question.

In respect to question III (the right of plaintiff in error to reopen the question of the reasonableness of the rates), the decision of the Supreme Court of Michigan was based upon the argument (F. P. R., 280-281), that the Commission is the rate maker; that a previous attack upon the Commission rates had been unsuccessfully prosecuted to the court of last resort; and that:

> "it would be wholly incongruous from an administrative standpoint to have successive juries or different courts and judges passing upon the reasonableness of a rate already fixed by the Commission."

The contention made by plaintiff in error is in the nature of a third attempt to try adjudicated issues which this court held could not be tried a second time (see 235 U. S., 402). The rates in question were established by the Michigan Railroad Commission and were confirmed by the Supreme Court of Michigan, as the result and at the end of chancery proceedings designed to test their validity. A new proceeding in equity to set them aside and restrain their enforcement, was dismissed by the federal district court, in conformity with the opinion of this court. A third attempt to retry the same issues in the state court certainly raises no federal question, but merely involves the issues of *res judicata. A fortiori,* no question is raised which can be brought within the terms of Section 237 of the Judicial Code as amended.

Question number IV in the list above given (the validity of the fifty-cent differential), was decided by the Supreme Court of Michigan, largely as a question of fact. The court said (F. P. R., 282):

> "If a rebate was intended, or was provided for, a discrimination in favor of particular shippers, no difference of opinion would exist. This provision was not questioned in the bill filed by the defendant. In my opinion, there is no rebate, no discrimination, provided for in the order. A uniform rate is established, and with it, a milling in transit rate, not necessarily unlawful, and not shown here to be unlawful."

Neither the constitutionality of the state statute, nor any other federal question is raised in this connection. The Elkins act and the Hepburn act are not involved because the railroad operated by plaintiff in error is located entirely within the state of Michigan (see 235 U. S., 403), and no interstate traffic is involved in the case.

Question number V in the list above given (the validity of the proceedings before the Michigan Railroad Commission), involves another attempt to raise for the third time a question which this court would not permit to be raised for the second time. As Mr. Justice Holmes states (235 U. S., 406):

> "Whether the Commission exceeded its jurisdiction or not, as it purported to make orders, the Michigan court had jurisdiction and the appellant is bound by its decree."

The question involved is, therefore, merely a question of *res judicata.*

Question number VI, in the list above given, raises in varied forms the contention that the judgment sought to be reviewed violates the Federal Constitution in that it deprives the plaintiff in error of its rights and property without due process of law and denies the equal protection of the laws. In each case the attack is upon the construction, not the validity of the state statute. Paragraph 10, of the assignments of error, alleges that the state statute, "*as construed and applied in these cases,*" is in conflict with the fourteenth amendment (F. P. R., 303). Paragraph 11, alleges that the statute, "*although fair on its face, was so construed and applied,*" etc. (F. P. R., 304). Paragraph 14 consists of vague repetition (F. P. R., 305). The *validity* of the state statute has never been questioned.

To justify the issuance of a writ of error under Section 237 of the Judicial Code as amended, it must be shown that there is drawn in question the validity of a statute of or an authority exercised under the state of Michigan, on the ground of alleged repugnance to the Constitution, treaties or laws of the United States. It is elementary that:

> "the authority conferred on a court to hear and determine cases in a state is not the kind of authority referred to. * * * Otherwise, every judgment of the Supreme Court of a state would be re-examinable."

*Bethell v. Demaret,* 10 Wall., 537.
*French v. Taylor,* 199 U. S., 274 (277).
*Philadelphia & R. Coal & I Co. v. Gilbert,* 245 U. S., 162.
*Stadelman v. Miner et al.* (April 15, 1918); 38 Sup. Ct. Rep., 359.

It is equally elementary that the aid of this court can be invoked only where an act alleged to be repugnant to the Constitution of the United States, has been decided by the state court to be valid, and not where an act admitted to be valid has been misconstrued by the court.

*Commercial Bank v. Buckingham,* 5 How., 317 (342).
*Ireland v. Woods,* 246 U. S., 323.

Other cases confirming the rule that the alleged misconstruction of a valid state statute by the state court will not support a writ of error under this or similar sections of the Judiciary Act, are:

*Grand Gulf R. Co. v. Marshall,* 12 How., 165.
*Ferry v. King County,* 141 U. S., 668.
*Central Land Co. v. Laidley,* 159 U. S., 103 (112).
See also *Ross v. Oregon,* 227 U. S., 150 (161).

Counsel has apparently attempted, by the language of the eleventh paragraph of the assignments of error (F. P. R., 303-4), to bring this case within the language of:

*Yick Wo v. Hopkins,* 118 U. S., 373.

The *Yick Wo* case involved a writ of *habeas corpus,* and it was claimed that the petitioner was denied the "equal protection of the laws." It was held that this constitutional provision was designed to furnish protection against the exercise of "purely personal and arbitrary power," etc. Apparently, it was the invitation held out by the law itself to unjust and illegal discrimination between persons in similar circumstances, and not the judicial misconstruction of an otherwise valid law which was in the minds of the court. The case at bar involves no situation resembling that in the *Yick Wo* case.

## ARGUMENT OF MOTION TO AFFIRM.

### I.

### Construction of Michigan Statute With Respect to the Effectiveness of the Freight Rate Fixed By the Michigan Railroad Commission.

The reasoning of the Supreme Court of Michigan is so clear, that any supporting argument seems unnecessary. The court said:

> "The Michigan Railroad Commission determined that certain rates theretofore published and exacted from shippers, by defendant, were unreasonable and ought not to be exacted and that certain other rates were and would be reasonable and proper to be exacted and should thereafter be exacted. The action of the Commission furnished for the benefit of any and every shipper, evidence that the old rates were illegal, the new rates reasonable and lawful. Although liable to be set aside by the courts, the result of what the Commission did was a legislative rate immediately in effect."

*Michigan Cent. R. Co. v. Circuit Judge,* 156 Mich., 459.
*Mich. R. Comm. v. M. C. R. R.,* 159 Mich., 580.
*D. & M. Ry. Co. v. Mich. R. Comm.,* 171 Mich., 335.
*Michigan R. R. Comm. v. D. & M.,* 178 Mich., 230.
*D. & M. R. Co. v. Mich. R. Comm.,* 240 U. S., 564.

"This point, a vital one, may be restated. The rates fixed by the Commission were not effective when, and if, an attack upon them failed, but were effective at once and pending any attack upon them (F. P. R., 279-80). * * *

"Defendant does, indeed, say that the charges made by it were once approved, and were published as its rates, and, until suspended, were lawful rates; this is a part of an argument which asserts that only the voluntary action of the carrier or the writ of mandamus can put into operation rates fixed by the Commission. It makes little difference whether we do or do not say that the new rates were in effect, or whether we say they were in effect, but not in operation. The old rates were condemned as unreasonable, and the new ones approved as reasonable by the Commission, action which is now and was when these suits were begun, conclusive upon defendant.

"Instead of publishing and collecting rates fixed by the Commission, defendant sought and obtained an injunction restraining the Commission from putting into operation its said orders. The statute plainly recognizes the authority of a court of equity to so suspend the operation of the orders of the Commission. The case of the defendant is not, however, that of one prevented from doing something, pleading the prevention in excuse, or bar, of the consequences of its enforced nonaction. On the contrary, it is pleading its own action, pleading the injunction it sought for and secured upon representations held to be unfounded, as an excuse for retaining an exaction at all times *prima facie* unlawful and finally, in its own suit, conclusively determined to be unlawful. The temporary injunction permitted defendant, notwithstanding the orders of the Commission, to continue to take what its published tariffs called for, but it is not apparent and is not pointed out, how it legalized the exaction."

See:

*Pac. Gas & Elec. Co. v. San Francisco* (D. C.), 211 Fed., 202.
*Spring Valley Water Co. v. San Francisco* (C. C.), 165 Fed., 667.
*Re Arkansas R. R. Rate* (C. C.), 168 Fed., 720.
*Bellamy v. Railway Co.*, 220 Fed., 876.
*State v. Railway Co.*, 265 Mo., 646.
(F. P. R., 281).

## II.

## Questions of Pleading and Practice.

The questions here involved are so exclusively questions of local practice, in respect to which the decision of the state court is controlling, that no argument is required.

## III.

## Plaintiff's Right to Reopen the Question of the Reasonableness of the Rates.

The claim of defendant in error was based upon rates fixed by certain orders of the Michigan Railroad Commission, which, as held by the Supreme Court of Michigan, took immediate effect, "although liable to be set aside by the courts."

An action to set them aside was prosecuted by plaintiff in error and it was finally and conclusively defeated in the courts of last resort, both state and federal.

*D. & M. Ry. Co. v. Mich. R. R. Comm.*, 171 Mich., 335.
*D. & M. Ry. Co. v. Mich. R. R. Comm.*, 235 U. S., 402.

All statutory and constitutional remedies have, therefore, been exhausted and the rate still stands. No possible ground of judicial attack remains. As a judicial controversy, the subject is *res judicata.*

Plaintiff in error always had the right to again apply to the Railroad Commission for a modification of its previous orders because of changed conditions. This right was expressly saved by the original decision of the Supreme Court of Michigan (171 Mich., 365). Such action should have been taken immediately thereafter, if grounds of equitable relief were claimed to exist. Instead of following this course, plaintiff in error spent years in ill-advised and vindictive litigation, and now complains because it is not permitted to litigate an already adjudicated question as many times and in as many courts as it desires. Until the conclusion of new and successful proceedings before the Railroad Commission (which proceedings were commenced after the accrual of the entire claim of defendant in error, F. P. R., 113), the former commission rates remained in force. Any further judicial attack upon them was precluded by the decisions of this court and the Supreme Court of Michigan.

## IV.

## The Validity of the Provision for a Fifty-Cent Differential.

That part of the commission's order which granted the fifty-cent differential was as follows (R., 8-9):

> "Above rates to apply when the manufactured product is reshipped via defendant company's line and when not to be so reshipped that defendant company are authorized to collect, in addition to said rate, fifty cents per thousand feet, but if later reshipment is made over defendant company's line, they are to refund to such shipper the fifty cents per thousand feet collected."

This provision is not a "rebate," but a differential. It does not fix a rate and then *subtract* something from it if the lumber is reshipped by rail, but first fixes the rate and then *adds* something to it if the lumber is not reshipped by rail.

Provisions of this nature had become very common in the making of railroad rates prior to the date of the Commission's order. They originated from the desire to permit the manufacture of raw material at intermediate points without losing the benefit of through rates, and had, therefore, acquired the well known appellation of "milling-in-transit rates," or by abbreviation, "transit rates." This particular provision and the amount of the differential was borrowed by the Commission from the previous tariffs of the plaintiff in error railroad company. In referring to these tariffs, they are identified by the initials "M. R. C.," followed by a number. "M. R. C." means "Michigan Railroad Commission," and the number is the distinguishing number given to the tariff by the Commission. M. R. C. 205, which was the discriminatory tariff originally complained of, provided:

> "A refund of fifty cents per thousand feet on logs will be made when an equal amount of manufactured product is shipped out via the Detroit & Mackinac Railway" (see 171 Mich., 353).

M. R. C. 208, which was the mileage tariff used by the Commission as a basis for their order, provided that:

> "The rates named herein apply only when the manufactured product is to be reshipped via Detroit & Mackinac Railway" (see 171 Mich., 354).

The rate discrimination originally complained of lay in the fact that the railroad company had made a mileage tariff applicable to all points on its line except Alpena (M. R. C. 208), while it compelled Alpena shippers to pay the rates fixed by the special Alpena tariff (M. R. C. 205), which were much higher than the mileage rates. The Commission merely extended the application of the mileage tariff to Alpena and *added (not subtracted)* a differential of fifty cents per thousand feet in all cases where the manufactured product was not reshipped over the defendant's railroad.

If this provision for a differential was not valid, then no transit rates are valid.

The Michigan statute provides:

> "Nothing in this act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions, and shall be subject to the provisions of this act as to the printing and filing of the same; provided all such rates shall be under the supervision and regulation of the Commission."

Sec. 11 of Stat., C. L., 1915, Sec. 8119.

Such transit rates are now universally recognized as valid.

*Watkins on Shippers and Carriers,* Sec. 169.

The validity of the statutory provision itself cannot be questioned. The Supreme Court of Michigan merely held that the differential was not a rebate, but a milling-in-transit rate. They said:

> "It will be perceived that the order of the Commission fixes freight rates to apply when manufactured product is reshipped via defendant's line, and when not so reshipped, the defendant is permitted to collect 50 cents per thousand feet additional, to be refunded however, if shipper later ships out the manufactured product or some of it. Ambiguous the order in some respects is, but not, I think, in respect to the rate. The order made a rate of $1 a thousand for logs in car loads moving 10 miles or less, and varying rates

as the distance was increased. To them defendant was permitted to add 50 cents a thousand, no matter what the length of haul, if the product was not shipped out by its line. Defendant could take nothing from these rates. What it did was to enforce its old tariff of $3 and $3.25 per thousand feet, which tariff contained the provision for a refund of 50 cents per thousand when an 'equal amount of manufactured product' was shipped out over its line. Defendant says that:

> " 'The rebates offered by the railroad company and the provision to the same effect in the order of the Railroad Commission' are a plain violation of the act. If a rebate was intended, or was provided for, a discrimination in favor of particular shippers, no difference of opinion would exist. This provision was not questioned in the bill filed by the defendant. In my opinion, there is no rebate, no discrimination, provided for in the order. A uniform rate is established, and with it a milling-in-transit rate, not necessarily unlawful and not shown here to be unlawful. *Watkins on Shippers and Carriers* (2nd Ed.), Sec. 169; *Transp. of Wool, Hides and Pelts,* 23 Interst. Com. Comm. R., 151; *Transit Case,* 24 Interst. Com. Comm. R., 340; *Laurel Mills v. Railroad Co.,* 84 Miss., 349; 37 South., 134; 66 L. R. A., 453. The statute, section 11, reads:
>
> > " 'Nothing in this act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions * * *' " (F. P. R., 281-282).

In the following case, the Supreme Court of Mississippi said:

> "It is no longer open to question that milling-in-transit arrangements are recognized as valid agreements which may be lawfully entered into between shippers and carriers."
>
> *Laurel Mills v. R. R. Co.*, 84 Miss., 349; 37 So., 134 (137).

## V.

## Validity of Original Proceedings Before Michigan Railroad Commission.

This has been already sufficiently discussed in the motion to dismiss.

This court said:

> "Whether the Commission exceeded its jurisdiction or not, as it purported to make orders, the Michigan court had jurisdiction and the appellant is bound by its decree.
>
> *D. & M. R. Co. v. Mich. R. R. Comm.*, 235 U. S., 402 (406).

## VI.

## Construction of Michigan Statute.

In view of the elementary rule that the construction of a state statute in such a case as this is a matter for the state courts, nothing need be added to what was said in connection with the motion to dismiss.

## ARGUMENT OF MOTION TO TRANSFER TO SUMMARY DOCKET.

The case is plainly of such a character as not to justify extended argument.

Respectfully submitted,

Edward S. Clark,
*Counsel for Defendant in Error.*

Office Supreme Court, U. S.
FILED
OCT 7 1918
JAMES D. MAHER,
CLERK.

In The

# Supreme Court of the United States

October Term, 1918.

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No. 339.

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DETROIT & MACKINAC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

*v.*

THE RICHARDSON LUMBER COMPANY,
DEFENDANT IN ERROR.

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## ANSWER TO MOTION TO DISMISS, AFFIRM, OR TRANSFER TO THE SUMMARY DOCKET, WITH BRIEF FOR THE PLAINTIFF IN ERROR.

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In The

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**No. 339.**

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DETROIT & MACKINAC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

*v.*

THE RICHARDSON LUMBER COMPANY,
DEFENDANT IN ERROR.

---

**In Error to the Supreme Court of the State of Michigan.**

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## ANSWER TO MOTION TO DISMISS, AFFIRM, OR TRANSFER TO THE SUMMARY DOCKET.

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The answer of the Detroit & Mackinac Railway Company, plaintiff in error, to the motion on behalf of defendant in error to dismiss, affirm or transfer this cause to the summary docket, respectfully represents to this Honorable Court:

1. Answering the first paragraph of the motion on behalf of defendant in error *to dismiss the writ of error* heretofore granted in this cause for the reason that this court has not jurisdiction thereof, plaintiff in error states that the provisions of Section 237 of the Judicial Code, as amended by the act of September 6, 1916, does not deprive the plaintiff in error of the right to have this court review, consider and determine the assignments of error alleged in this cause by the issuing of a writ of error to the Supreme Court of the state of Michigan.

This is one of five cases, each involving practically the same legal questions, which by stipulation were tried together in the circuit court for the county of Bay, state of Michigan, and while five separate appeals were made to the State Supreme Court, but one opinion was written by that court, which opinion in express terms controlled them all, and pursuant to such opinion the five judgments were separately affirmed.

Numerous questions are raised in the record common to all the cases, and errors are assigned which meet the requirements of such Judicial Code, and sufficiently involve federal questions to confer jurisdiction, as will appear more fully from the consideration and discussion of such questions.

On the trial of this cause in the circuit court objection was made on behalf of plaintiff in error to the introduction in evidence of a certain order made by the Michigan Railroad Commission, on the 19th day of October, 1909, for the reason that no complaint had been made to said commission pursuant to the statute, that the railroad rates and tariffs on the transportation of logs to the city of Alpena, state of Michigan, were unjust, unreasonable and excessive, and that no hearing was had on any such allegation before such Railroad Commission; that no evidence was introduced to show that the rates to Alpena were unjust, unreasonable and excessive, the complaint relating exclusively to an asserted discrimination in favor of shipments as against lumber industries in the city of Alpena, and that to permit such order in evidence as a basis for a recovery in the action then pending in said court would be a violation of the Fourteenth Amendment of the Constitution and in violation of the provisions in such amendment with respect to the due process of law provision.

Objection was further made to the introduction of such order in evidence on the ground that it provided for an unlawful rebate of fifty cents per thousand feet on all logs so shipped, thereby discriminating in favor of the defendant in error to such extent as to make such order void and of no force and effect.

It was contended on behalf of plaintiff in error that all shippers living in the city of Alpena were entitled to the same rate on the transportation of logs to Alpena, regardless of the subsequent disposition of the manufactured product.

On the trial of said cause in the circuit court, counsel for plaintiff in error made an extended offer of proofs to the effect that for the years 1910 to 1915, inclusive, the plaintiff in error was entitled to earn on the valuation of its investment and property a sum and amount approximating at least eight per cent. Counsel offered to submit proofs establishing the fact that if such order was held effective it would deprive the plaintiff in error of sufficient revenue in the operation of its railroad to earn the amount named or any part thereof, and would ultimately result in the confiscation of its property without due process of law. A consideration of the offer of proofs entire is necessary in order to appreciate the materiality of such proofs, and to such offer reference now here is expressly made (F. P. Co. record, 297-300).

Other legal questions are raised by the assignments of error in this court, a consideration of which will establish the fact that the Supreme Court of the United States had jurisdiction to issue such writ of error and to review the determinations of the Michigan Supreme Court.

2. It is contended by defendant in error that this Honorable Court should affirm the judgment of the Supreme Court of the state of Michigan in this cause, for the reasons that it is manifest that such writ of error was taken for delay only and that the questions on which the decision of the cause depend are so frivolous as not to need further argument (defendant's brief, 1-2).

Counsel is wholly unjustified in asserting that the application for the writ of error to this Honorable Court was made for the purpose of delay only, as nothing in the proceedings heretofore taken throughout this entire litigation warrants such allegation. We insist many vexing legal questions are involved in these cases, all of which were thoroughly briefed, argued and considered in the circuit and supreme courts of the state of Michigan, and to allege they were and are frivolous is unwarranted in fact and in law.

The statutes of the state of Michigan prescribe with great particularity and minuteness the proceedings to be taken in the establishment of tariffs and rates for the transportation of forest products in the state of Michigan. It was contended from the very inception of this litigation that the demands of the defendant in error were in violation of the statutes of the state of Michigan and an infraction of the Constitution of the United States and of the state of Michigan. The circuit court for the county of Bay, in rendering judgment against the plaintiff in error and its associates, aggregating an amount in excess of $100,000, so rendered such judgments in opposition to every contention of counsel for plaintiff in error and in violation of the constitutional rights of this railroad company.

It was contended by counsel for plaintiff in error that it had the right to submit proofs showing that if this order of the Railroad Commission was held valid and plaintiff in error foreclosed from further proofs, the result would be a confiscation of the property of the plaintiff in error, and to say that these questions are raised for the purpose of delay only and are frivolous, amounts to the assertion that the existence of plaintiff in error and its constitutional rights are matters unworthy of consideration.

In answering the allegations in the second paragraph of counsel's motion, we allege that the application for the writ of error was made in good faith and for the sole purpose of obtaining a just and legal determination of the questions involved in this cause.

3. The third paragraph of counsel's motion is to the effect that if this Honorable Court shall not dismiss the writ of error or affirm the judgments, that this proceeding and suit be transferred for hearing to the summary docket for the reason that the cause is of cush a character as not to justify extended argument.

If the plaintiff in error in this cause is entitled to a writ of error, vital and important questions of law are involved, as appears from the record and the assignments of error. To say that they are of such a character as not to justify extended argument is an unwarranted assumption on the part of counsel. The same allegations and assertions might be said respecting any cause appealed to this Honorable Court by writ of error.

It is not the desire of the plaintiff in error that any unusual or exceptional delay shall be had in the disposition of this case, but no reasons are advanced why it should not take its course with the other cases pending in this Court.

From the citations of law and the arguments of counsel in his brief following the motion hereinbefore referred to, it is apparent that the questions raised by the assignments of error involve questions of law entitled to thorough and exhaustive consideration by carefully prepared briefs. Plaintiff in error in this case and in each of the cases involving the same questions of law, have filed ample and sufficient bonds protecting the defendants in error, to the end that if the contentions of the plaintiff in error are not finally supported by the decision of this Honorable Court, such defendants in error cannot sustain loss or damage. If they are entitled to an affirmance of the judgments they will receive the full amount thereof with lawful interest, and no exceptional conditions prevail whereby they should be advanced for hearing to the summary docket.

We respectfully submit that the motion to dismiss, affirm or transfer to the summary docket be denied by this Honorable Court.

James McNamara,
Detroit, Michigan,
Henry & Henry,
Alpena, Michigan,
*Counsel for Plaintiff in Error.*

In The

# Supreme Court of the United States

October Term, 1918.

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No. 339.

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DETROIT & MACKINAC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

*v.*

THE RICHARDSON LUMBER COMPANY,
DEFENDANT IN ERROR.

---

## BRIEF FOR PLAINTIFF IN ERROR.

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### Statement.

The plaintiff in error is a Michigan railroad corporation, its main line extending from Bay City, Michigan, on the southerly, thence northerly to the city of Cheboygan, passing through the city of Alpena, with branches and spurs extending into timbered sections available for the transportation of logs and other forest products, in carload lots, to mills in Alpena.

The defendant in error is a Michigan corporation with its manufacturing plants at the city of Alpena, Michigan, where, for many years, it has been engaged in the manufacture of lumber and other materials made from forest products.

By Act 312, Laws of Michigan, 1907, railroad companies in the state of Michigan were required to file with the Michigan Railroad Commission (herein designated M. R. C.) and publish and post in their offices and depots tariff rates for hauling logs, forest products and other commodities.

After this Act became effective the Detroit & Mackinac Ry. Co. (herein designated as D. & M. Ry. Co.), the plaintiff in error, complied with this law. In naming and quoting schedules or tariff rates for log transportations we shall restrict the same to such logs and products as may be the subject of this controversy.

At and prior to the beginning of this suit, the plaintiff in error had on file and legally posted, tariff rates particularly informing all shippers and the public generally as to rates from and to all stations and places where it was transporting forest products.

February 1st, 1909, a rate was scheduled, filed and posted for carload shipments of logs to Alpena from the various places on the lines and branches of the plaintiff in error's railroad, each way from Alpena, providing for a minimum of 2,500 feet per car, this schedule being designated as M. R. C. 205.

The schedule last named fixed the rate on logs from designated places to Alpena, from north and south, at $3 and $3.25 per thousand feet (except Paxton Station, $2.50 per M.). It provided for a refund of 50 cents per thousand feet when an equal amount of products were shipped out over plaintiff in error's road.

This tariff of rates had been approved by the Michigan Railroad Commission, thereby establishing specific rates on all kinds of logs to Alpena in carload lots.

April 19, 1909, Frank W. Gilchrist, Churchill Lumber Company and the Island Mill Lumber Company, three lumber concerns of the city of Alpena, made and filed with the Michigan Railroad Commission a complaint alleging that the scheduled tariff rate, M. R. C. 205, discriminated against Alpena shippers in favor of Cheboygan, a city at the northerly terminus of the D. & M. Ry., and that such tariff was "unjust and unduly discriminatory" and higher than the rates established by a certain schedule designated as M. R. C. 208. In such complaint prayer was made for an order requiring plaintiff in error to cease and desist from said violations of the acts referred to in such complaint and "to publish and file with the Michigan Railroad Commission rates shown on attached statement" (there being attached to such complaint a statement of rates proposed by said complainants).

Plaintiff in error filed an answer to this complaint, denying the allegations therein contained and alleging that the prayer for relief should be denied.

February 20, 1909, a rate in like manner was effectively scheduled, filed and posted for hauling logs in carload lots, naming a rate on a mileage basis without reference to the places from or to which the same were to be transported. This schedule contained a provision with reference to rates where manufactured products were shipped out on the plaintiff in error's road.

In like manner plaintiff in error filed answer to this complaint, denying the relief prayed for.

M. R. C. 208 had a very limited application because in addition to the specific rates on shipments to Alpena, specific rates were in force on logs shipped to Cheboygan and Onaway (stations along the D. & M. Ry), as established by a certain M. R. C. 199, effective January 19, 1909, on shipments of logs to Cheboygan, and by a certain other schedule designated M. R. C. 204, effective February 1, 1909, on shipments of logs to Onaway.

The rates established by M. R. C. 199 and 204, were less than the rates established by M. R. C. 205, on shipments to Aplena. The Cheboygan rates as far south as a station on said road designated as Case, were $1.80 per thousand, and further south, $2 per thousand. The Onaway rates were $1.50 per thousand from all stations except those less than ten miles from Onaway, which were $3 per car for 2,500 feet, or $1.20 per thousand.

After filing the complaints herein named and before the proofs were concluded before the Commission, the plaintiff in error filed and posted a new schedule of rates designated as M. R. C. 237, thereby *abolishing all discrimination in favor of Cheboygan,* eliminating all occasion for complaint in that particular.

Pending the hearing on the complaint before the Commission, this fact was made known; however, complainants insisted on prosecuting their complaint, asserting that M. R. C. 237 might not have been made in good faith.

The only charge left against the plaintiff in error for consideration by the Commission was that it was charging higher rates by the established specific rates, M. R. C. 205, than by the mileage rates named in the general tariff M. R. C. 208, and as the latter tariff did not apply to either Alpena, Cheboygan or Onaway, as by express terms transportation of logs to these places was governed by the specific rates duly and effectively filed and posted, M. R. C. 205; 199 and 237.

The testimony for the complaining parties was taken before the Commission June 3, 1909, and thereafter and on the 22nd of October, 1909, the Commission made an order on the so-called Gilchrist et al. complaint, wherein it stated:

> "Now, therefore, by virtue of the authority vested in us by law,
>
> "It is hereby ordered, that the Detroit & Mackinac Railway Company do publish and file and put into operation so as to become effective twenty days from the date of the service of this order on defendant, a tariff for the transportation of logs in carload lots to the said city of Alpena, as follows:"

(Then followed a rate corresponding with M. R. C. 208.)
In the same order preliminary to the above quotation, the Commission found:

> "That the matters alleged in the complaint are substantially true and that the rates charged for the transportation of logs in carload lots to the said city of Alpena are unjust, unreasonable and excessive, and that said rates should be reduced as hereinafter set forth."

Nothing was contained in the above order to the effect that the rates complained of were discriminatory.

Thereafter, ascertaining that their order of October 22 was wholly defective, the Michigan Railroad Commission having named no minimum amount for carload lots, on November 3, 1909, without any further hearing and on their own initiative, they made a supplemental order fixing such minimum amount for carload lots at 2,500 feet per car.

October 19, 1909, on the complaint of the Fletcher Paper Co., as to M. R. C. 217, the Michigan Railroad Commission made an order wherein they alleged that it appeared to them that the switching charge or rate of $5 per car between Alpena and Fletcher Dam was unreasonable and unjustly discriminatory, and that a rate of $3.50 per car would be reasonable and just, made the following order:

> "Now, therefore, by virtue of the authority vested in us by law,
>
> "It is ordered, that the said defendant, the Detroit & Mackinac Railway Company, within twenty days from the date of service of a certified copy of this order on it, file, publish and put in force a rate for switching charges between Alpena, Michigan, and Broadwell's Dam (otherwise designated as Fletcher Dam), of not to exceed $3.50 per car in each direction on all commodities.

> "Ordered further, that M. R. C. 217, heretofore filed and published by said defendant, be canceled, and that said Detroit & Mackinac Railway Company cease and desist after said twenty days from charging more than $3.50 per car in each direction between Alpena, Michigan, and Broadwell's Dam, for any commodity."

We here call this court's attention to an error in the printed record, at page 296, where, in the first assignment of error, the date of the order of the Michigan Railroad Commission, D-188, reads "the 19th day of October, A. D. 1909," the same should read "the 22nd day of October, A. D. 1909." This correction is vitally important as other orders are involved in this cause, one of which does bear the date, October 19th, 1909.

## PROCEEDINGS AFTER ORDERS OF COMMISSION.

On June 2, 1909, Act 300 of the Public Acts of 1909, was approved and by its terms, Act 312 of the Public Acts of 1907, of the state of Michigan, was repealed to the extent of conflict between the two acts.

The plaintiff in error did not file, publish and put into effect the schedule of rates provided for in the orders above designated.

The schedule of rates for the transportation of logs into Alpena, as filed and posted pursuant to Act 300 of the Public Acts of 1909, of the state of Michigan, prior to the orders last named, continued unchanged throughout the litigation which followed and until February 18, 1915.

It was the contention of the plaintiff in error that the orders made by the Michigan Railroad Commission were void and not enforcible. Therefore, plaintiff in error, being dissatisfied with such orders, on November 20, 1909, and within the time provided by Section 26, Act 300, P. A., 1909 (as subsequently amended), filed its bill of complaint in the circuit court for the county of Wayne, state of Michigan, in Chancery, wherein it alleged the reasons why such orders should not become effective or operative and why the plaintiff in error should not publish and file a schedule of rates pursuant to such orders. The bill of complaint alleged in detail the plaintiff in error's objections to the proposed rates, asserting that they were unlawful and unreasonable and were not subject to the regulation or control of the Michigan Railroad Commission; that they were in conflict with the constitutional provisions and laws of the United States and the state of Michigan in that they were in violation of the due process of law clause of the Fourteenth Amendment.

In order that plaintiff in error migth have the benefits of the law relative to a determination of the orders complained of, an injunction was prayed for to restrain the Commission from enforcing or attempting to enforce such orders or make them effective.

On reading and filing the bill of complaint, Judge Mandell of the Wayne circuit court for the state of Michigan, on the 20th day of November, 1909, made an order requiring the Commission to show cause on the 24th day of November, 1909, why such injunction should not issue.

In pursuance of this order, and on the 24th day of November, 1909, an injunction was duly issued out of the said Wayne Circuit Court directed to the Michigan Railroad Commission, therein, requiring it to:

> "desist and refrain from putting into operation or making effective the three orders of said Michigan Railroad Commission directed to the Detroit & Mac-

> kinac Railway Company, said complainant, dated respectively October 22, 1909; October 19, 1909, and November 3, 1909, known and set forth in complainant's bill of complaint as Exhibits 1, 2 and 3, which said orders undertake to make a new tariff for the transportation of logs in carload lots to the city of Alpena over the Detroit & Mackinac Company's railroad, and to make new switching charges for said complainant Detroit & Mackinac Railway Company, other than the ones now in force and effective on said complainant's railroad, until the further order of this court."

On the 2nd of December, 1909, this injunction was duly served on the Michigan Railroad Commission, proof of service being made and filed.

December 2, 1909, the attorney general of the state of Michigan, Honorable John E. Bird, the legal representative of the Michigan Railroad Commission, met with Mr. James McNamara, general counsel for the plaintiff in error, in his office in Detroit, where they reviewed the entire situation, both as to the facts and the legal status of the controversy, at which time it was understood between them that the Commission's orders involved in this case should not become effective in any way until the case was finally heard upon its merits, and that the defendant should collect its present rates and the posted tariffs should remain in full force and effect until the case was finally disposed of on its merits, and pursuant to such understanding the following stipulation was made and filed in the cause:

> "(Title of court and cause.)
>
> It is hereby stipulated by and between the attorneys for the respective parties hereto that the application for injunction and the order to show cause made by said court, and the hearing thereon, may be and is hereby continued in its present state until

the final determination of said cause upon the merits thereof.

Dated, the 2d day of December, A. D. 1909.

John E. Bird,
Attorney General.

James McNamara,
Solicitor for Complainant."

On the 24th day of November, 1909, the time fixed by Judge Mandell of the Wayne circuit court, in his original order to show cause why an injunction should not issue, Mr. McNamara appeared for plaintiff in error, no one appearing on behalf of the Commission; thereupon, the hearing was continued to the 27th day of November, 1909, at which time the assistant attorney general of the state of Michigan requested that the matter be continued until the 2nd day of December, 1909, when the attorney general met with the general counsel of plaintiff in error and made the stipulation hereinbefore referred to.

Thereafter the legality of the orders of the Michigan Railrod Commission as hereinbefore set forth were litigated in the circuit court for the county of Wayne, Michigan, the Supreme Court of the state of Michigan, also in the District Court of the United States, and in the United States Supreme Court, resulting in decrees to the effect that such orders of the Michigan Railroad Commission were valid and enforcible, whereupon the plaintiff in error filed and published, pursuant to the statute hereinbefore referred to, tariff of rates for the transportation of forest products in pursuance of such orders, such rates being duly published and posted in its various tsations on, to-wit: the 15th day of February, 1915.

It would serve no useful purpose to review the litigation respecting the validity of these orders through the various courts in determining the assignments of error in this cause, and for that reason we refrain from a recital thereof in this statement.

On the 3rd day of April, 1915, the Fletcher Paper Company, defendant in error, the Island Mill Lumber Company, the Richardson Lumber Company, the Churchill Lumber Company and the Michigan Veneer Company, all lumbering concerns and corporations located at Alpena, Michigan, each commenced an action in the circuit court for the county of Bay, state of Michigan, against the D. & M. Ry. Co., the plaintiff in error, by filing and serving a declaration containing the common counts in *assumpsit* and a special count, thereby seeking to recover from plaintiff in error the difference between the rates exacted by the railroad company and the rates prescribed by the orders of the Railroad Commission.

As the questions involved in the five cases were practically the same, by stipulation the five cases were heard at one and the same time, resulting in judgments for the plaintiffs in such suits, as follows:

| | |
|---|---|
| Fletcher Paper Company | $ 25,879.16 |
| Island Mill & Lumber Company | 24,611.83 |
| Richardson Lumber Company | 28,318.80 |
| Churchill Lumber Company | 14,412.63 |
| Michigan Veneer Company | 16,122.89 |
| Total | $109,345.31 |

Included in the judgments in these cases, the plaintiffs (defendants in error in the instant cases) recovered a rebate of 50 cents per thousand feet of logs in addition to the difference between the log rates collected by the railroad company and those prescribed by the Railroad Commission, as follows:

| | |
|---|---|
| Fletcher Paper Co., 20,481,619 ft. | $10,240 |
| Island Mill Lbr. Co., 22,514,642 ft. | 11,257 |
| Churchill Lumber Co., 21,685,371 ft. | 10,842 |
| Richardson Lbr. Co., 16,680,379 ft. | 18,340 |
| Michigan Veneer Co., 4,648,964 ft. | 2,324 |
| Total | $43,003 |

The plaintiff in error appealed to the Supreme Court of the state of Michigan from the judgments so rendered against it by the five lumber company corporations, where the judgments were affirmed.

Thereafter application was made to the Supreme Court of the United States for writs of error in each case, and on filing bonds duly approved by this Court, writs of error to the Supreme Court of the state of Michigan were duly granted.

## ASSIGNMENTS OF ERROR.

Many of the errors relied on for a reversal of the judgments rendered in the circuit court for the county of Bay, and affirmed by the Supreme Court of the state of Michigan, will not be considered in this brief. As other briefs will be filed in behalf of plaintiff in error, we shall confine ourselves to the consideration of such of the assignments of error as relate to the following questions:

(a) The validity of the orders of the Michigan Railroad Commission of date October 19, 1909; October 22, 1909, and November 3, 1909.

(b) The refusal of the court to permit plaintiff in error to submit additional proofs.

(c) The refusal of the circuit court for the county of Bay, state of Michigan, to consider and pass upon the proposed findings of fact and conclusions of law in behalf of plaintiff in error.

(d) Filed and posted rates control.

(e) Reparation—future rates.

(f) Act 300, P. A., 1909, supersedes the common law.

(g) Interstate Commerce Act.

**M. R. C. Order October 19, 1909.**

The order of the Railroad Commission of date October 19, 1909, was offered and received in evidence on the trial in the circuit court for the county of Bay, over the objections of counsel for plaintiff in error, and this is assigned as the first error relied upon in this court and is set forth in full in the record (296-297).

Regardless of the authority of the Michigan Railroad Commission under the complaint filed as the basis of this order, the making of the order depended upon the proofs submitted to the Commission, and in the absence of any evidence to support the making of such order it could not be of any force or effect.

When this order was offered in evidence the following objection was made to it:

> "Mr. Baker: I object to that order on the ground that there was no complaint to the Michigan Railroad Commission that the rates to Alpena on logs were unjust, unreasonable and excessive, and that there was no hearing on any such allegation before the Railroad Commission. No evidence was introduced to show that the rates to Alpena were unjust, unreasonable and excessive. The complaint in that case related exclusively to the discrimination in favor of shipments as against Alpena, and I insist that to sustain this order and grant the plaintiff any relief on this order would be a violation of the due process of law—of the Fourteenth Amendment and of

> the same clause in our own constitution. I also make the objection that the provision in this order for a 50-cent refund was an improper rebate and discrimination in favor of the Fletcher Paper Company, and is absolutely void, in and of itself a violation of the Michigan act. Our position in regard to that is that all shippers living in Alpena are entitled to the same rate regardless of what they do with their products."

The court received the order in evidence and the judgments subsequently rendered in the five cases were predicated on the rates named in such order.

It must be remembered that at the time of the making of this order the plaintiff in error was hauling logs for the lumbermen of Alpena under a regularly posted and published tariff, and that it proceeded to haul forest products to Alpena and collect from the lumbermen the rates provided for in the posted and published tariffs.

After the making of this order by the Michigan Railroad Commission, the plaintiff in error diligently prosecuted its appeals from such order through the various courts herein before designated, and no action was taken on behalf of defendants in error to place themselves in a position where they were legally entitled to any other or different rate than that posted and published pursuant to Act 300 of the Public Acts of 1909.

The suit in the circuit court for the county of Wayne in Chancery and the appeal to the Supreme Court of the state of Michigan were expressly authorized by Section 26 of such Act, and the suit in the District Court of the United States for the Eastern District of Michigan in Equity, and the appeal to the Supreme Court of the United States were expressly authorized by the Constitution and laws of the United States. The plaintiff in error did not resort to any remedy, make any defense or invoke any jurisdiction it was not authorized to resort to, make, or invoke by such laws.

Act 300, Laws of 1909, of Michigan, regulating common carriers, is similar to the United States Interstate Commerce Act, and so far as every question of law involved in these cases are concerned the laws are identical, in fact the Michigan Act was framed to conform with the Interstate Commerce Act.

This is clearly indicated in the case of *Wadley Southern Ry. Co. v. Georgia, 235 U. S., 651.* Justice Lamar, in his opinion in this case, passes on the right of a common carrier to have a judicial determination on an order of the state commission and to determine its validity and reasonableness, and the right to invoke relief in the United States courts in such determination. At pages 659-661, he states:

> "It is, however, contended that those cases (referring to *209 U. S., 123, 163; Wilcox v. Consolidated Gas Co., 212 U. S., 19, 53, before cited)* related to penalties for charging rates higher than those which had been established by the legislature without any hearing having been given to carriers as to what were reasonable rates, and are applicable to a case like this where the order made after a full hearing had been given by the commission to the Wadley Southern. This contention would have been well founded if this and other hearings of a like nature before the commission had resulted in orders which had the characteristics of a final judgment, but this was not so if they were not conclusive.
>
> *Chicago Ry. v. Minnesota, 134 U. S., 418, 458.*
>
> "Their lawfulness was treated by the Georgia court in the present case as open to inquiry when the company was sued for a penalty. The question of their validity was also open to inquiry in equity proceedings in the state court where they would have been set aside if found to be arbitrary and unreasonable or to have violated some statutory or constitutional right.
>
> *Railroad Commission v. L. & N. R. R. Co., 140 Georgia, 817 (6 a), 836.*

*State of Georgia v. Western & Atlantic R. R., 138 Georgia, 835.*
*Southern Railway Co. v. Atlanta Sand Co., 135 Georgia, 33, 50.*

"Such orders were also subject to attack in the Federal courts on the ground that the party affected had been unconstitutionally deprived of property.

*Louis. & Nash. R. R. Co. v. Garrett, 231 U. S., 298, 313, and cases cited.*

"And this right to a judicial determination exists whether the deprivation is by a rate statute passed without hearing (as in *Young & Consolidated Co.'s cases);* or by administrative orders of a commission made after a hearing (as in the *Garrett case, supra),* for rates made by the general assembly or administrative orders made by a commission are both legislative in their nature.

*Garrett case, supra.*
*Grand Trunk R. R. v. Indiana Railroad Commission, 221 U. S., 400, 403.*

"Any party affected by such legislative act is entitled by the due process clause to a judicial review of the question as to whether he has been thereby deprived of a right directed by the Constitution.

*Chicago, etc. v. Minnesota, 134 U. S., 418, 458.*
*Chicago, etc. Ry. Co. v. Tompkins, 176 U. S., 167, 174.*
*Prentis v. Atlantic Coast Line, 211 U. S., 210.*
*Missouri Pacific Ry. v. Nebraska, 217 U. S., 196, 207.*
*Oregon R. R. Nav. Co. v. Fairchild, 224 U. S., 510.*
*San Joaquin Co. v. Stanslaus Co., 233 U. S., 459.*
*Bacon v. Rutland R. R., 232 U. S., 134.*
*Detroit R. R. Co. v. Michigan R. R. Com., 235 U. S., 402.*

"The methods by which this right to a judicial review are secured, vary in different jurisdictions. In some states there is a provision that within a

> designated time the order may be reviewed by the courts on the evidence submitted to the commission.
>
> *Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S., 510; 68 Wash., 160, 167; 17 New Mexico, 557; 131 Pac. Rep., 980; 173 Fed. Rep., 957, 989.*
>
> In others by proceedings in equity.
>
> "In the Federal courts the method of procedure when administrative orders are attacked as unconstitutional, is now regulated by Section 266 of the Judicial Code as amended (March 4, 1913 (c), 160, 37 Stat., 1013, 1014).
>
> "But in whatever method in force, the right to a judicial review must be substantially adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at a risk of having to pay penalties so great that possibly it is better to yield to orders of uncertain legality rather than to ask for the protection of the law."

After all of the proofs had been submitted (including all of the proceedings had in the various courts testing the validity of the order of the Michigan Railroad Commission), the judge of the circuit court for the county of Bay, pursuant to the practice in the state of Michigan, was requested on behalf of plaintiff in error to pass specially upon forty-four requests for findings of fact and conclusions of law (R., 128-138). It became the duty of the judge of said circuit court to consider such requests and to indicate his decision and finding respecting the same, including therein the right to receive in evidence and to consider as a basis for the judgment in this case, the order of the Railroad Commission herein complained of.

Notwithstanding such duty, said circuit judge dismissed such requests in the briefest possible way by stating they were refused.

We contend, that the question of the right to receive in evidence the order of the Michigan Railroad Commission of October 19, 1909, has never received the judicial consideration which it was entitled to and that we have a right in this Court under our assignment of error in that behalf to have considered the admissibility of such order, and if this court shall determine that it was void and of no force and effect that will dispose of each of the five cases appealed to this Court by writ of error.

**Submission of Proofs.**

By the second assignment of error (R., 298-300), we insist that on the trial of this cause in the circuit court for the county of Bay, the offer of proofs on behalf of plaintiff in error should have received favorable consideration.

In order to appreciate the force of this assignment of error it must be remembered that the evidence bearing on the rates which the plaintiff in error was entitled to charge for the transportation of forest products, was concluded on the 15th day of August, 1910 (Rate R., 765).

The judgments rendered by the circuit court for the county of Bay, on the 27th of November, 1916, included the difference between the posted and published tariff of rates and the rates provided for in the order of the Railroad Commission of date October 19, 1909, to and including the 18th day of February, 1915. A period of 4½ years intervened within which no proofs were taken.

During this period of 4½ years the question as to the legality of the Commission's order was being litigated, and during the entire period of litigation no action was taken whereby the defendant could legally or consistently charge rates other than those named in its posted schedules.

During this 4½ years, which is a blank to this Court, so far as proofs go, many changes took place along the line of the Detroit & Mackinac Railway, as pointed out by Mr.

McNamara in his motion to dismiss, preceded by a statement of plaintiff in error's claim as hereinbefore stated.

Cost of material and labor had greatly increased during this period, while the forest products were growing less, and many reasons existed why plaintiff in error was entitled to a rate on the transportation of logs as high, if not higher, than as provided for in its posted schedule of rates.

Mr. Baker, in his offer of proofs, stated concise facts and figures which he had prepared with great care. That the Court might understand the importance of such evidence, such offer of proofs is set forth in full in the assignment of error now being considered, at pages 298-300 of the record in this Court and cause. The defendants in error (plaintiffs in the actions referred to in the circuit court for the county of Bay) objected to the introduction of such proofs, claiming that it was a matter of no importance whether evidence was available which would change conditions as prevailed at the time of making such order, and the circuit court sustained such objections and refused to permit the plaintiff in error to put in evidence the facts as outlined by Mr. Baker.

In view of the fact that the court excluded these proofs, it must be assumed in the consideration of this assignment of error that each and every fact alleged by Mr. Baker could have been established by competent evidence. Counsel for defendants in error rely upon Section 25 of Act 300, Public Acts of Michigan, for 1909, in support of the rejection of such proofs. This section reads as follows:

> "Section 25: All rates, fares, charges, classifications and joint rates fixed by the Commission, and all regulations, practices and services prescribed by the commission shall be in force and shall be *prima facie* lawful and reasonable until finally found otherwise in an action brought for the purpose, pursuant to the provisions of Section 26 of this Act, or until

> changed or modified by the Commission as provided for in Section 24 of this Act."

We insist that the *prima facie* evidence referred to in such section is subject to rebuttal evidence.

> *Meeker & Co. v. Lehigh Valley R. R., 236 U. S., 412, 430* (and cases therein cited).

The very language of the statute, *"shall be prima facie lawful and reasonable,"* carries with it the express implication that such rates may be assailed and proofs may be offered to overcome the *"prima facie"* lawfulness thereof.

The only effect of this statute is that it puts the burden of proof on the contesting parties.

In a suit under sub-section (g) of Section 10, to recover the reparation awarded by the Commission for an excessive charge, the order of the Commission is *prima facie* evidence only, and the carrier can defend by showing that the rates exacted by it were reasonable. If the carrier pays the award no suit can be maintained against it and any damage attributable to the overcharge must be taken to have been considered in the award.

> *Louisville & Nashville R. R. Co. v. Ohio Valley Co., 37 Sup. Court Rep., 120.*

In that case the Court, by Justice Holmes, construing the Interstate Commerce Act, said:

> "An award directing the carrier to pay to the complainant the sum to which he is entitled, is provided for by Section 16. By the same section, if the carrier does not comply in due time with the order, the complainant may sue in a state court—which implies that if the order has been complied with and the money paid, no suit can be maintained."

Carriers have a right to a determination by the Commission of questions of reparation for excessive rates or charges, coupled with the further right to pay the reparation awarded and thereby avoid any further litigation.

These rights of carriers are directly opposed to the theory that a shipper or consignee can maintain an action without first seeking reparation.

If such suits could be maintained, carriers would be subject to varying and conflicting verdicts and judgments in which different views as to what were reasonable rates would prevail. The whole object of conferring power over rates on commissions, federal and state, would be defeated. Actions under the common law for the recovery of excessive rates would be restored and the administrative function of the commission eliminated.

When the Railroad Commission of the state of Michigan, on the 19th day of October, 1909, by their order, determined that:

> "The rates charged for the transportation of logs in carload lots to said city of Alpena are unjust, unreasonable and excessive, and that said rates should be reduced as hereinafter set forth,"

it arrived at such determination on the evidence before then submitted to it, and made such order on a condition of affairs existing between the railroad and the lumbermen at that identical time, namely, October 19, 1909.

On an appeal from the order to the circuit court for the county of Wayne, state of Michigan, proofs as to the reasonableness of the rates were taken showing the facts as they actually existed to and including the 5th day of August, 1910.

On the 7th day of April, 1915, these suits were instituted in the circuit court for the county of Bay and a judgment was obtained for the difference between the amounts exacted by the railroad, and the amounts provided for in the Railroad Commission's orders, to the 18th day of February, 1915.

If the order of the Michigan Railroad Commission was *prima facie* evidence during all of this period when no evidence had been taken, that the rates fixed by the order were legal and reasonable, why should not the plaintiff in error, if it could do so, overcome this *prima facie* condition by actual evidence and show that an entirely different condition of affairs prevailed subsequent to the making of the order, to the end that whatever was fair and reasonable might have been adjudicated and determined in these proceedings.

The Supreme Court of the state of Michigan affirmed the holding of the circuit court for the county of Bay, and in passing upon this question of the right to submit additional proofs, stated:

> "Everything essential to a recovery so far as the character of the exaction is concerned, has been determined by the Commission whose determination they rely upon. If it were otherwise, if the charges exacted by the defendant had been duly fixed according to the act and approved by the Commission, and they were attacked, a different question would be presented. In such a case the Commission and not the court should be first applied to. In the first place the Commission is the rate maker; in the second place it would be wholly incongruous from an administrative standpoint to have successive juries or different courts and judges passing upon the reasonableness of a rate already fixed by the Commission. To this effect are the decisions (here quoting U. S. and Federal decisions). These cases are authority also for the ruling of the trial court refusing to receive and consider offered evidence and denying defendant the right to try out in these cases the question of the reasonableness of the exactions it made."

We respectfully submit that it was error on the part of the Michigan courts to deprive the plaintiff in error of the right to meet the demands of the defendants in error by evidence respecting the charges which this railroad company had a right to make in the matter of transportation of forest products to the city of Alpena.

**Findings of Fact and Conclusions of Law.**

Every question involved in this litigation upon which plaintiff in error relied, as set forth in its request for findings of fact and conclusions of law, is set forth in this record, at pages 128-138, inclusive.

Pursuant to the Constitution of the United States and the Constitution of the state of Michigan, every litigant is entitled to his day in court and cannot be deprived of his property without due process of law.

When the defendants in error in these several cases, filed their declarations in the circuit court for the county of Bay, on the third day of April, 1915, a demand was made for a bill of the particulars of their respective claims.

Finally, in the interest of simplifying the issues as much as possible, the parties, by their attorneys, stipulated to all the facts about which there could be no controversy, such as the number of feet of logs hauled, date of transportation and computations based on the contentions of the respective parties.

When these suits were tried in the circuit court, the plaintiff in error was entitled to a judicial determination of every lawful issue pursuant to the practice in the state of Michigan, and this was controlled by the Constitution of the state of Michigan, the statutes of the state of Michigan and the rules prescribed by the Supreme Court of the state of Michigan.

When the proofs had finally been submitted to the circuit court on behalf of plaintiff in error, the judge of the circuit court who rendered judgment in these actions, was asked, pursuant to such practice, to pass upon the several questions involved as a basis for judgment, but instead of doing so, signed a paper prepared by the attorney for the defendants in error which amounted to nothing more than a refusal to pass upon such questions.

As illustrative of the court's failure to comply with the law and practice in that regard, we refer this Honorable Court to the paper filed in the circuit court for the county of Bay, on the 27th of November, 1916, headed:

> "Rulings on defendant's requests, etc.,"

and quoting from what follows:

> "The first request made by defednant is refused.
> "The second request is refused.
> "The third request is refused. Etc." (R., 145-148).

Error was assigned on the refusal of the court to pass specially upon plaintiff in error's requests, and we now here urge that plaintiff in error by reason thereof was by the judgment rendered in said circuit court and affirmed in the Michigan Supreme Court, deprived of its property without due process of law.

**Filed and Posted Rates Control.**

By the tenth assignment of error it is alleged as follows:

> "The plaintiff in error further says: That it is manifest on the record and proceedings aforesaid and the judgments and opinion of the Supreme Court of Michigan that Act 300 of the Public Acts of Michigan of 1909, as construed and applied in these cases is in conflict with the Fourteenth Amendment of the Constitution of the United States in that the Detroit & Mackinac Railway Company is thereby deprived

> of it rights and property without due process of law and is denied the equal protection of the law" (R., 303).

Counsel for defendants in error assume to invoke so much and such parts of said Act 300 as justify them in collecting from the plaintiff in error an amount in each case equal to the excess collected by plaintiff in error on the transportation of logs, pursuant to the orders hereinbefore referred to, over and above the rates and tariffs filed and posted in pursuance of such act, without reference to the reasonableness of such rates and tariffs during the long period which ensued after the Michigan Railroad Commission made such orders.

The defendants in error, before such orders were made, paid the rates filed and posted pursuant to such act, and we insist that if such act is enforced defendants in error are restricted to such rates and tariffs as were filed and posted, and were not entitled to recover any excess thereof until new rates and tariffs were filed and posted.

The rates fixed by the Michigan Railroad Commission October 22nd, November 3rd, 1909, were not in force and effect until the defendant, in obedience to the orders of the commission of October 22nd, 1909, and the mandate of the Supreme Court of the state, December 20th, 1914, filed and published its schedule of rates on February 18th, 1915.

The railroad company was required and legally obliged to follow its old schedule of rates until a new one was filed and published. Any departure therefrom before the new schedule was effective would have been a plain violation of the express provisions of the Act.

Carriers are prohibited from engaging in the transportation of passengers or property:

> "unless the rates, fares and charges upon which the same are transported by said carrier have been

> filed and published in accordance with the provisions of this Act."
>
> *Sub-section (f), Sec. 10.*

The sub-section further says:

> "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith between the points named in such fares or charges which are specified in the tariff filed and in effect at the time."
>
> "Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privilege or facilities in the transportation of persons or property except such as are specified in such tariff."

The imperative nature of these provisions is shown by Sections 16, 17, 18 and 19.

Carriers are prohibited from making any change in their schedules of rates except after ten days notice to the Commission and to the public.

> *Sub-section (b), Sec. 10.*
>
> "And no such rates, fares or charges or joint rates, fares or charges shall be discontinued except after giving such notice as is required for changing rates."

When the carrier gives notice of a proposed change in its rates, the Commission is authorized to suspend the taking effect of the new rates for a period not exceeding 45 days, and during that time to make an investigation giving the carrier a hearing and then make an order allowing or disallowing the rates proposed.

A carrier cannot voluntarily change its rates without submitting them to the judgment of the Commission and abiding by its decision. A carrier, however, can defeat an order of the Commission if it successfully invokes the jurisdiction of the court.

It is contended that the rates ordered by the Commission have the same force and effect as if established by the legislature itself.

If the petition or complaint conforms to the statute and a proper hearing is had, followed by an order justified by the complaint and hearing, and if no agreement, stipulation, or injunction supersedes the effect of the order, this would be true; but, in this case, the acts of the parties, the nature and terms of the complaints and orders and conference and stipulation with the attorney general, together with the injunction collectively and severally suspend and postpone the effectiveness of such orders as legislative action.

Counsel for defendants in error rely on the *Consolidated Gas Company case, 146 Fed., 150, 157; 212 U. S., 19,* and on the *Pacific Gas & Electric Co. v. San Francisco, 211 Fed., 202,* and on a number of other cases in which temporary injunctions were granted on the condition that the difference between the rates ordered by the legislature or by a commission, and the rates the companies were charging sohuld be impounded pending the litigation or that, a bond be given to secure the refunding of the difference to all consumers in case the companies were not successful in the litigation.

The protection of the consumers was secured by the direct action of the courts. In that way uniformity among all consumers was obtained.

In the instant case no such conditions were imposed, and the restraining order and injunction issued expressly for that purpose commanded the commission that it "do absolutely desist and refrain from putting into operation or making effective," the orders of the commission.

The Railroad Commission cannot be enjoined from fixing rates as the orders of the Commission are harmless and have no force until they are put into operation and become effective.

*McChord v. L. & N. Ry. Co., 183 U. S., 483.*

In that case, the court, examining the Kentucky statute, found that it was not the duty of the Railroad Commission to enforce the rates it might fix, and that the method of enforcement should be by criminal prosecution instituted by the Commission.

The Michigan statute is the same, Sec. 41, with the additional remedy of "proceedings in mandamus, injunction or other appropriate civil remedies," Sec. 47. The Commission did not institute any criminal prosecution and did not apply for a mandamus until June 16, 1914, the rate being granted July 25th, 1914, *182 Mich., 234.*

Consideration must be given to the agreements between the parties. While the stipulation did not use the word "injunction," it used equally as forceful words, and the fact that after December 2, 1916, when the stipulation was made and the conference had, no further hearing was had on the order to "show cause," is conclusive as to the intent of the parties and the ineffectiveness of the orders.

**Reparation—Future Rates.**

It is conclusively certain that the orders of the Commission were not in force or effective until the mandamus was granted, and the rate itself was not effective until February 18th, 1915.

If a carrier has filed and published rates, fares or charges that are regarded by shippers or travelers as unreasonable and excessive, two remedies are provided by Act 300, which have these distinguishing features: one remedy is for the recovery of excessive rates that have been collected by the carrier in the past; and the other to compel the carrier to file and publish new and reasonable schedules of rates for the future.

These remedies are distinct from each other. Past excessive rates are recoverable on complaints under sub-section (g) of Sec. 10, praying for a refund of excess, or as more frequently called: Complaints for Reparation.

On such complaints the Commission is not authorized to make any order as to future rates. It merely fixes the amount of the excess and it had no power to issue an execution or any other process or order to enforce the payment. The claimant is authorized to bring an action on the award in the courts of this state. The findings of the Commission in making the award are made *prima facie* evidence, but the carrier can make a defense that the charges it had collected were reasonable and the whole issue of reasonableness is tried before the court, or court and jury, and the award of the Commission approved or disapproved.

It is expressly apparent that no action to recover excessive rates already collected by a carrier can be maintained until a complaint has been made to the Commission and an award of reparation obtained, otherwise the language of the Act is meaningless.

The primary jurisdiction of the Commission over the rates of carriers is exclusive. The jurisdiction of the courts cannot be invoked until the Commission has acted, and then only to enforce legal orders, subject to such other defenses as may be properly made.

On complaints to fix future rates under Sec. 22 of the Act, the Commission has no power to make awards for reparation, and in the orders of the Commission of October 19th and 22nd, and November 3rd, 1909, no reparation was awarded.

Counsel for defendants in error have misapprehended the legal situation of this controversy. They assume that they can evade the requirements of the Act in regard to claims for reparation. One of the requirements is that the claim be submitted to the Commission before any action is brought. Another requirement is that complaints for reparation must be made to the Commission within six months from the time when the excessive rate was paid.

This is a plain statute of limitations, and no one can seriously contend that it can be evaded by bringing a common law action. If the plaintiff's action can be sustained as a common law action, it is open to common law defenses, and the whole question whether rates collected by the railroad were reasonable or not will have to be tried in this case wholly regardless of the decision of the Railroad Commission.

In a common law action the rates fixed by the order of October 22, 1909, would not be even *prima facie* reasonable.

They were not fixed on a complaint for reparation and are not within the provisions of sub-section (g), Sec. 10, which provides that in actions to recover awards made by the Commission "in the trial thereof the findings of the Commission shall be *prima facie* evidence of the truth of the facts found by it," etc.

On the trial of such an action the carrier can defend on the ground that the rates which the Commission, in making its award held were reasonable, were not so, as a matter of fact, and in that way the question of reasonableness would be fully tried on the merits.

The purpose of sub-section (g) is to prevent such trials as much as possible by requiring the question of the reasonableness of the rates actually collected by the carrier to be first submitted to the Commission. The evident design of the statute is that in most cases the awards of the Commission will be sufficiently satisfactory to the carriers to cause them to pay the awards and make actions for the recovery to the same unnecessary.

The Interstate Commerce Commission has held that when a rate has been canceled and the lower rate has become effective, a carrier cannot voluntarily refund for the freight charges already collected and thus give him the benefit of the new rate on shipments that moved under the prior higher rate. The Commission alone has jurisdiction to authorize a refund to be made from charges collected on previous shipments.

> *Poor Grain Co. v. Chicago, etc. Ry. Co., 12 I. C. C. R., 418, 425.*

The distinctions between complaints for reparation and complaints to fix future rates was stated by the Supreme Court of the United States in

> *Louis. & Nash. R. R. Co. v. Garrett, 231 U. S., 298, 320.*

In that case the Kentucky Railroad Commission made two orders: one fixing rates for the future, and the other awarding reparation. The awards could be enforced by proceedings in court. The order fixing rates for the future was sustained as legislative. The court refused to pass on the order awarding reparation. Mr. Justice Hughes, for the court, said:

> "It thus appears that the two proceedings, though they were conducted at the same time, were distinct in their nature. The one resulted in a legislative rule for the future; in the other there was an award of specific sums of money to particular persons upon the basis of past transactions, and this award, according to the provisions of the statute, on being filed could be enforced by proceedings in the courts of the state. The persons in whose favor the award

> was made were not parties to the suit, and we think that the court was right in declining to determine its validity."

## Act 300, P. A., 1909, Supersedes Common Law.

The common law remedy for excessive charges by railroad companies for the carriage of freight have been superseded and abolished by sub-section (g) of Sec. 10 of the Act for the regulation of common carriers. Act 300, Laws 1909, pages 704, 715, as reenacted by Act No. 139, Laws 1911, pages 205, 209, reads as follows:

> "(g) Within six months after the delivery of any shipment of freight at destination, any person aggrieved may complain to the Commission that the charge exacted for the transportation of such freight between points in Michigan is irregular or exorbitant, and thereupon the Commission shall have power to investigate such complaint and to hear the same and to decide upon the merits thereof in the manner provided by Sec. 22 of this Act. If, upon such hearing, the Commission shall decide that the rate or charge exacted is irregular or exorbitant, it shall find what in its judgment would have been a reasonable rate or charge for the service complained of. If the rate or charge so found shall be less than the charge exacted, the carrier shall have the right to refund to the person paying such charge the amount so found to be excessive. In case of the refusal of the carrier to make such refund, the party aggrieved thereby may maintain an action in the courts of this state to recover the amount of such excessive charge as found by said Commission, and in the trial thereof the findings of the Commission shall be *prima facie* evidence of the truth of the facts found by it, and no carrier shall be permitted to avail itself of the defense of such action that the shipment involved was in fact made on the published tariff rate in

> force at the time such shipment was made, but no carrier making a refund upon the order of the Commission or pursuant to a judgment of court, as herein provided, shall be liable for any penalty or forfeiture or subject to any prosecution under the laws of this state on account of making such refund."

*Penn. Refining Co. v. West N. Y. & P. R. R. Co., 208 U. S., 426.*

is a case where the Interstate Commerce Commission granted reparation, and in proceedings in the United States circuit court, under Sec. 16 of the Interstate Commerce Act, the award of the Commission was sustained and a judgment entered for the amount thereof and interest. This judgment was reversed by the United States circuit court of appeals, whose judgment was affirmed by the Supreme Court of the United States.

A reparation order by a state commission was sustained in *L. & N. R. R. Co. v. Finn, 235 U. S., 601.*

The cases of *Fanrsworth v. National Express Co., 166 Mich., 676,* and *Crowley Bros. v. Grand Trunk R. R. Co., 185 Mich., 482,* are not applicable, because in both of these cases the carriers sought to limit their liability by provisions inserted in the schedules or tariffs filed by the Michigan Railroad Commission.

The cases in the Supreme Court of the United States on which we rely were rate cases.

The question whether any rate is reasonable or excessive is by both the State Act and the Interstate Commerce Act placed within the jurisdiction of the Commission.

When a carrier files a schedule fixing a rate, no departure therefrom can be lawfully made; neither a less nor a greater rate can be charged or collected until a schedule of rates has been filed changing such rate.

Such new schedule can be obtained by complaints to the Commission, under Sec. 22 of Act 300.

After a hearing thereon, the Commission can fix the rate to be charged and order the carrier to file a schedule putting the rate or rates into effect.

The order of the Michigan Railroad Commission of October 22nd, 1909, set forth in the declaration of defendants in error, followed the statute and ordered the plaintiff in error to:

> "publish, file and put into operation, so as to become effective 20 days from the date of the service of this order on it, a tariff for the transportation of logs in carload lots to Alpena, as follows," etc.

At the common law an excessive charge by a common carrier could be recovered in an action at law wherein the whole question of the reasonableness of the charge would be tried and disposed of as a judicial question.

The decision arrived at would be *res adjudicata* as between the parties to the case and binding on them until a change in the facts surrounding the service or in the cause thereof required a new adjudication; it would temporarily and until there was a change in conditions, settle the rate of charge for the future.

It having become settled law that fixing rates for the future is a legislative and not a judicial question, and that the Interstate Commerce Commission and State Railroad and Corporation Commissions' Act as the ministerial agents of the legislative power, the remedies provided by legislation creating such commissions for excessive charges are necessarily exclusive of the old common law remedies.

**Interstate Commerce Act.**

The Michigan Act, regulating common carriers, was modeled after the Interstate Commerce Act, both making provisions for reparation.

The only difference between the Interstate Commerce Act and the Michigan Railroad Commission Act is condensed into sub-section (g) of Act 300 aforesaid.

The Federal provisions are in the more elaborate provisions of Sections 13 to 16 of the original Interstate Commerce Act as amended March 2nd, 1889.

The legislative provisions are similar in the following particulars:

1. The remedy given for excessive charges is a complaint to the Commission for reparation.
2. If the Commission finds the rates charged were excessive, reparation may be awarded for the excess.
3. If the carrier refuses to pay the award, an action can be brought for its recovery under the State Act in any circuit court of the proper county and under the Federal Act in the United States Circuit Court (now District Court in Equity), if a jury trial is essential on the law side of the court.
4. In these court actions the findings and orders of the Commission are *prima facie* evidence only, and the whole question whether the charges made by the carrier are reasonable or not may be litigated and determined.

There is only one difference between the State Act and the Federal Act. The State Act requires complaints for reparation to be made to the Commission within six months after the excessive charge was exacted by the carrier and paid to it by the claimant or shipper.

This in itself indicates a defined intention that the statutory remedy by complaint to the Commission was designed to be exclusive of the common law remedy which would otherwise prevail.

The United States Court, in an able opinion by Chief Justice White, held that the Act abolished and abrogated the common law remedies.

> *Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S., 426.*

Justice White, appreciating the rule that repeals by implication are not favored, logically and conclusively discriminated by showing that if the common law remedy still existed, the Interstate Commerce Act would be nullified, in that every claimant as to excessive charges would be privileged to pursue the carrier in numerous courts, and there would be as many different rules of reasonableness as there were cases and courts to decide them.

The purpose of the Act was to afford a preliminary investigation by the Commission and the judicial jurisdiction to be exercised in actions brought to recover the awards of the Commission.

Any parties in such controveries would be entitled to a judicial determination at some place in the proceedings, but the jurisdiction of the courts should not be invoked until the remedy before the Commission is exhausted, with the evident design that in the majority of cases resort to the courts would be unnecessary.

The recovery of excessive rates actually collected by the carrier could be consummated by making complaints for reparation under sub-section (6), Sec. 10, Act 300, and after a hearing on such complaint the Commission could order the carrier to refund any amount found to be excessive. If the carrier refused to pay such amount determined, suit could be instituted against the carrier to recover any reparation ordered. On the trial of any such action the findings of the Commission are *prima facie* evidence only.

A shipper is not precluded from testing a rate fixed by the Commission as shown by schedule filed by carrier in obedience to the order of the Commission, but he can only do so before the Commission by making a complaint under said subdivision (g).

The defendants in error in these cases have made no such complaints and it is indefensible to contend in view of this legislation that they may resort to a common law action.

If common law actions are open to all shippers, the question of reasonableness of railroad freight rates can be taken out of the jurisdiction of the Railroad Commission and be tried with varying and conflicting results in inunmerable cases.

In considering this question, we especially request the Court to consider the opinion of Chief Justice White in the *Abilene Cotton case (204 U. S., 430-448).*

It is a lengthy opinion and the full strength, force and application of the case cannot be comprehended without a careful perusal of it in its entirety.

**Summary:**

We undertake to summarize the argument and conclusions as follows:

1. At the common law an action could be maintained against a common carrier for excessive charges whether coercively exacted in advance or at the completion of the service.

2. The Interstate Commerce Act made it the duty of common carriers to charge only just and reasonable rates.

To enforce that duty they were required to establish, file and publish schedules of such rates, being prohibited from any departure therefrom until they were changed as authorized by the Act.

3. Shippers may assail the rates so established by complaints to the Commission on which the Commission might grant a departure from such rates in favor of the complainant alone and also require the carrier to establish new rates applicable to all shippers.

4. When such new rates have been established, shippers who have paid the old rates during the period when the carrier enforced its unreasonable schedule of rates, would be granted relief on complaints to the Commission for reparation.

5. The distinction between the two complaints is "that which, on the one hand, would arise from destroying the uniformity of rates which it was the purpose of the statute to secure, and on the other from enforcing that equality which the statute commands."

6. The provision in the Interstate Commerce Act that "nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act, are in addition to such remedies," cannot in reason be construed as continuing for the benefit of shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the Act. In other words, the Act cannot be held to destroy itself.

The provisions in the Federal Act undertakes to preserve "remedies," while a provision in the Michigan Act says nothing about remedies, but relates entirely and exclusively to the liability of common carriers. A provision in Section 40 reads as follows:

> "Provided that nothing herein contained shall be so construed as to abridge or in any wise lessen the

> liability of any such common carrier as it now is under existing laws."

Preceding the above quotation in the same section is the following:

> "And no common carrier shall limit or change its common law liability by contract, or otherwise, as to its responsibility for the negligent act of its agents and servants with reference to property in its custody as a common carrier."

The entire object and purpose of both the Federal Act and the State Act is to preserve common law liabilities; they create no new liability, but they do provide for exclusive remedies which must be followed. Hence it is, that in the present case the plaintiff must first seek reparation as provided in sub-section (g) of Section 10 of the Michigan Act.

That the reasoning of the Supreme Court of the United States in the *Abilene Cotton Oil case (204 U. S., 430-448)* is applicable to the Michigan Act, is clearly demonstrated by the subsequent decisions of the United States Court which are cited in the case of *Loomis v. Lehigh Valley R. R. (240 U. S., 43)*. We call especial attention to the quotations on pages 49 and 50 of the case last cited.

The case of *Texas & Pacific Ry. v. American Tie Co. (234 U. S., 138)* is a case where the railroad company had a tariff on lumber in which cross ties were not mentioned, and the controversy arose over the question whether cross ties were or were not lumber, with great diversity of opinion among experts. The Court held:

> "1. That if there was no tariff on ties the railroad company could not carry them without first filing such a tariff.
>
> "2. That the question whether ties were or were not lumber was primarily a question for the Inter-

> state Commerce Commission and not for the courts.
>
> "3. That therefore the action of the plaintiff should have been dismissed in the court below for want of jurisdiction."

In the case of *Wolverine Brass Works v. Southern Pacific Ry. Co., 187 Mich., 393 (153 N. W., 778),* this court, in an opinion by Justice Moore recognized the difference between an action wherein it is alleged that the rates collected by a carrier, as fixed by its tariffs, duly filed and published, are unreasonable and an action wherein it is alleged that the carrier has departed from its tariffs as filed and published. The one attacks the rates of the carrier and the other affirms and supports them and insists that they be observed.

Justice Moore quotes at length from *Gimbel Bros. v. Barrett (215 Fed., 1004),* wherein the distinction is clearly pointed out between matters on the one hand primarily within the administrative powers of the commission, and, on the other hand matters which are not within the exclusive jurisdiction of the commission.

Both the case of *Wolverine Brass Works* (Michigan Supreme Court) and the case of *Gimbel Bros.* (Federal Court), relate to Interstate shippers and are governed by the Interstate Commerce Act; but the reasons which were advanced by the Supreme Court of the United States for its decision that common law remedies were abolished are very much stronger in the Michigan Act. The reparation provisions of sub-section (g) were not enacted until June 2, 1909.

The *Abilene Cotton Oil Company case (204 U. S., 430)* was decided February 25, 1907, and it must be assumed that the legislature when it modeled its reparation provisions after the Interstate Commerce Act and made them more positive and imperative, the intention was that they should have the same effect and the like construction.

*Preston National Bank v. Wayne Circuit, 142 Mich., 272.*
*In re Fox's Estate, 154 Mich., 5.*
*Harrison v. Sager, 27 Mich., 476.*
*Greinier v. Klein, 28 Mich., 12.*

Believing the questions herein discussed come within the assignments of error alleged in this Court and cause, and are controlling as to the issues involved, we respectfully request this Honorable Court to reverse the decision of the Supreme Court of the State of Michigan.

James McNamara,
Detroit, Michigan,
Henry & Henry,
Alpena, Michigan,
*Counsel for*
*Plaintiff in Error.*

Office Supreme Court, U. S.
FILED
OCT [illegible] 1918
JAMES D. MAHER
CLERK

In The

# Supreme Court of the United States

October Term, 1918.

No. [illegible]

DETROIT & MACKINAC RAILWAY COMPANY,
PLAINTIFF IN ERROR.

v.

RICHARDSON LUMBER COMPANY, DEFENDANT IN
ERROR.

## SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Edward [illegible] Clark,
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[illegible] Canfield,
Alpena, Michigan.
*Counsel for Defendant in Error.*

In The

# Supreme Court of the United States

October Term, 1918.

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No. 339.

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DETROIT & MACKINAC RAILWAY COMPANY,
PLAINTIFF IN ERROR.

v.

RICHARDSON LUMBER COMPANY, DEFENDANT IN
ERROR.

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## SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

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The brief for plaintiff in error just received contains certain inaccuracies of statement which need correction.

It is incorrectly stated, page 2, that "there is no material difference between" the Interstate Commerce Act and the Michigan Railroad Commission Act. There are marked dissimilarities between the two statutes. Section 14 of the Interstate Commerce Act, both in its original form and as amended in 1906, gives the Interstate Commerce Commission power to make an award of damages to a shipper injured by a violation of the act on the part of the carrier.

There is no similar provision in the state statute and no similar powers are conferred upon the Michigan Railroad Commission. The provisions of the state statute most nearly resembling those of the Federal Act are Sub-section (g) of Section 10 (Compiled Laws of Michigan of 1915, Section 8118 (g) ), and Sub-section (a) of Section 22 (Compiled Laws of Michigan, Section 8130 (a) ). These sections are printed at length in the appendix at the end of this brief. The powers of the Michigan Railroad Commission are limited to the establishment of lawful rates, practices and regulations. Under Section 10 (g) all that the Commission can do is to find what, in its judgment, would be a reasonable rate or charge for the service complained of. Under Section 22 (a), the Commision establishes rates to be charged in the future. Under neither section is there any provision for an award of damages or order of reparation. That is left for the courts.

This was the question decided by the Michigan Supreme Court and referred to as the "second point decided," on pages 10 and 11 of the brief filed with our motion to dismiss in the *Fletcher Paper Company* case. As there stated, the Supreme Court of Michigan held that no "reparation" remedy is provided by the Michigan statute and that no reapplication to the Commision is required as a preliminary to the commencement of suit.

Counsel's reference to "rebates" is entirely misleading, as is also their attempt (page 2, of brief), to separate the judgment of the Fletcher Paper Company into three elements, one of which is characterized as a rebate. No such separation is proper. The judgment contained only two elements—first, excessive log freights; second, excessive switching charges. The order of the Michigan Railroad Commission did not provide for any rebate. It fixed a log rate applicable when the manufactured product was reshipped by the railroad, and then authorized the railroad company to add fifty cents per thousand feet to this rate if the manufactured product was not so reshipped. (Fletcher Paper Company Record, page 15.) If this differential (which counsel call a "rebate"), is invalid, the railroad company will lose money instead of gaining it. In computing the amount of the overcharge in each case, the basic rate actually used was that fixed by the Commission's order, viz.: The flat commission rate in all cases where the lumber was reshipped by rail and the flat commission rate, plus fifty cents per thousand feet in all cases where the lumber was not reshipped by rail. The differential feature of the rate which counsel now call a "rebate," was as fully adjudicated and validated by the previous decisions of this court and of the other federal and state courts as any other part of the rate. It was an integral part of it. As shown under the heading "Sixth Point decided," on page 13 of the brief filed with our motion to dismiss, the Supreme Court of Michigan held that this differential was not a rebate, but was a lwful "milling-in-transit rate," and, as such, authorized by the state statute. The section of the statute referred to is Section 11 (Compiled Laws of Michigan of 1915, Section 8119). This section is printed in full in the appendix to this brief.

## ARGUMENT.

### I. and II.

The cases cited on pages 3 and 4 of the brief for plaintiff in error, are not in point.

In *St. Louis, etc., R. Co. v. Starbird,* 243 U. S., 592 (at page 594), the three essential questions were stated as follows:

> (1) Was there a right involved which is the creation of a Federal statute (or otherwise within the terms of Section 237 of the Judicial Code)?
>
> (2) Was it sufficiently set up and called to the attention of the State court so as to be "especially set up or claimed?"
>
> (3) Was the decision against the right set up or claimed?

In the present case, we are raising questions of substance, not of form, and, therefore, the cases of *Minnesota & St. Louis R. R. v. Minnesota,* 193 U. S., 53, and *Hendersonville, etc., Co. v. Blue Ridge Ry.,* 243 U. S., 563, cited by counsel (which involved questions of pleading), are not important.

The case of *American Sugar Refining Co. v. Louisiana,* 179 U. S., 89, is distinguishable because the so-called Federal questions raised in the present case are not even "plausible upon their face." The *Starbird* case *(supra),* involved the construction of a Federal statute. None of the cases cited in the brief for plaintiff in error were within the operation of the amendmnet of September 6, 1916, to Section 237 of the Judicial Code.

## III.

*Lehigh Valley R. R. Co. v. United States,* 243 U. S., 444, cited on page 4 of the brief of plaintiff in error, does not support counsel's argument. The present case does not involve any conflict between state and federal statutes or regulations. The Detroit & Mackinac Railway Company is an intrastate road. Every shipment involved in this case is an intrastate shipment. The argument that the mere carrying of a certain amount of interstate traffic by an intrastate road is sufficient to give this court jurisdiction of a controversy *not involving such traffic,* answers itself. The shipments involved here constituted no part of any interstate business. They were all shipments of logs from Michigan forests to Alpena, Michigan. The outgoing freight rates from Alpena are not in controversy.

Respectfully submitted,

Edward S. Clark,
*Counsel for Defendant in Error.*

## APPENDIX.

### Extracts From Michigan Statutes Referred to Above.

*Section 10 (g) of Michigan Railroad Commission Law, Compiled Laws, 1915, Section 8118 (g).*

"Within six months after the delivery of any shipment of freight at destination, any person aggrieved may complain to the commission that the charge exacted for the transportation of such freight between points in Michigan is irregular or exorbitant, and thereupon the commission shall have power to investigate such complaint, and to hear the same and to decide upon the merits thereof, in the manner provided by section twenty-two of this act. If, upon such hearing, the commission shall decide that the rate or charge exacted is irregular or exorbitant, it shall find what, in its judgment, would have been a reasonable rate or charge for the service complained of. If the rate or charge so found shall be less than the charge exacted, the carrier shall have the right to refund to the person paying such charge, the amount so found to be excessive. In case of the refusal of the carrier to make such refund, the party aggrieved thereby may maintain an action in the courts of this state to recover the amount of such excessive charge as found by said commission, and in the trial thereof, the findings of the commission shall be *prima facie* evidence of the truth of the facts found by it, and no carrier shall be permitted to avail itself of the defense of such action that the shipment involved was, in fact, made on the published tariff rate in force at the time such shipment was made, but no carrier making a refund upon the order of the commission or pursuant to a judgment of court, as herein provided, shall be liable for any penalty or forfeiture, or subject to any prosecution under the laws of this state on account of making such refund;"

*Section 11 of the Michigan Railroad Commission Law, Compiled Laws, 1915, Section 8119.*

"Nothing in this act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances, and conditions, and shall be subject to the provisions of this Act as to the printing and the filing of the same: *Provided* all such rates shall be under the supervision and regulation of the commission."

*Section 22 (a) of Michigan Railroad Commission Law, Compiled Laws, 1915, Section 8130 (a).*

"Upon complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission shall notify the common carrier complained of that complaint has been made and shall furnish a copy of the said complaint with said notice, and twenty days after such notice has been given, the commission may proceed to investigate the same as hereinafter provided. Before proceeding to make the investigation, the commision shall give the said common carrier and the complainants at least ten days' notice of the time and place when and where such matters will be considered and determined, and said parties shall be entitled to be heard and shall have process to enforce the attendance of witnesses. Such hearings may be continued from time to time in the discretion of the commission. If, upon such investigation, the rate or rates, joint rate or rates, fares, charges or classifications, regulation, practice or service complained of shall be found to be unreasonable, inadequate or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future, and such classifications, regulation, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate, or unjustly discriminatory, and in either case, the commission shall make an order that the common carrier cease and desist from such violation, and shall conform to the regulation and practice so prescribed, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the common carrier affected thereby, which order shall, of its own force, take effect and become operative twenty days after the service thereof. All common carriers to which the order applies shall, on or before the date when such order becomes effective, make such changes in schedules on file as shall be necessary to make the same conform to such order, and no change shall, within two years thereafter, be made by any such common carrier in any such rates, fares or charges, or in any such joint rate or rates, without the approval of the commission. Certified copies of all other orders of the commission shall be delivered to the common carriers thereby affected in like manner, and the same shall take effect within such times thereafter as the commission shall prescribe;"

## PROOF OF SERVICE.

State and Eastern District
of Michigan, } ss.
County of Wayne.

.................................., of Detroit, Michigan, being duly sworn, deposes and says that on the ......................day of October, 1918, he served a supplemental brief for defendant in error, of which the annexed is a true copy, upon James McNamara, one of the counsel for plaintiff in error, by delivering the same during business hours at the office of said James McNamara, at 2026 Dime Bank Building, Detroit, to .................. ................, who was then in charge of said office.

Deponent further says that on the .................... day of October, 1918, he served a copy thereof upon Fred A. Baker, one of the counsel for plaintiff in error, by delivering the same during business hours, at the office of said Fred A. Baker, at 526 Dime Bank Building, Detroit, to ..............................., who was then in charge of said office.

Deponent further says that on the .................... day of October, 1918, he served a copy of said brief upon Charles R. Henry, one of the counsel for plaintiff in error, by enclosing the same in a sealed envelope, plainly addressed, to said Henry, at Alpena, Michigan, that being his business address, and depositing the same in the United States postoffice in the city of Detroit, Michigan, with postage fully prepaid.

..............................

Sworn to and subscribed before me this ............... day of October, 1918.

............................,
Notary Public, in and for
Wayne County, Michigan.

My commission expires ..................................